No. 15669

United States Court of Appeals
For the Ninth Circuit

HARRY JOSEPH, *Appellant*,

vs.

DONOVER COMPANY, INC., a corporation; HARRY J. O'DONNELL; RALEIGH CHINN; KINZUA CORPORATION, a corporation; MARK F. MATHEWSON and RICHARD K. BUSH, Trustees in Dissolution of CAPITAL TIMBER PRODUCTS COMPANY, a corporation; CAPITAL TIMBER PRODUCTS COMPANY, a corporation; ALVIN SCHWAGER; E. W. STUCHELL; D. E. WYMAN; M. H. WYMAN, and BRYANT R. DUNN, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

BRIEF OF APPELLEES

RYAN, ASKREN, MATHEWSON, CARLSON & KING
JOHN E. RYAN, JR.
RICHARD K. BUSH
545 Henry Building, Seattle 1, Washington,
Attorneys for Appellees Capital Timber Products Co., and Mark F. Mathewson and Richard K. Bush, Trustees in Dissolution.

GRAHAM, GREEN & DUNN
THOMAS M. GREEN, JR.
BRYANT R. DUNN
FRANK T. ROSENQUIST
625 Henry Building, Seattle 1, Washington,

WILBUR J. LAWRENCE
6609 White Building, Seattle 1, Washington,
Attorneys for Appellees Donover Company, Harry J. O'Donnell, Raleigh Chinn, Kinzua Corporation, Alvin Schwager, E. W. and

GROSSCUP, AMBLER, STEPHEN & MILLER
JOHN AMBLER
PENDELTON MILLER
711 Central Building, Seattle, Washington,
Attorneys for Appellee, Harry J. O'Donnell.

No. 15669

United States Court of Appeals
For the Ninth Circuit

HARRY JOSEPH, *Appellant*,

vs.

DONOVER COMPANY, INC., a corporation; HARRY J. O'DONNELL; RALEIGH CHINN; KINZUA CORPORATION, a corporation; MARK F. MATHEWSON and RICHARD K. BUSH, Trustees in Dissolution of CAPITAL TIMBER PRODUCTS COMPANY, a corporation; CAPITAL TIMBER PRODUCTS COMPANY, a corporation; ALVIN SCHWAGER; E. W. STUCHELL; D. E. WYMAN; M. H. WYMAN, and BRYANT R. DUNN, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

BRIEF OF APPELLEES

RYAN, ASKREN, MATHEWSON, CARLSON & KING
JOHN E. RYAN, JR.
RICHARD K. BUSH
545 Henry Building, Seattle 1, Washington,
Attorneys for Appellees Capital Timber Products Co., and Mark F. Mathewson and Richard K. Bush, Trustees in Dissolution.

GRAHAM, GREEN & DUNN
THOMAS M. GREEN, JR.
BRYANT R. DUNN
FRANK T. ROSENQUIST
625 Henry Building, Seattle 1, Washington,

WILBUR J. LAWRENCE
6609 White Building, Seattle 1, Washington,
Attorneys for Appellees Donover Company, Harry J. O'Donnell, Raleigh Chinn, Kinzua Corporation, Alvin Schwager, E. W. Stuchell, D. E. Wyman, M. H. Wyman and Bryant R. Dunn.

GROSSCUP, AMBLER, STEPHEN & MILLER
JOHN AMBLER
PENDELTON MILLER
711 Central Building, Seattle 4, Washington,
Attorneys for Appellees Harry J. O'Donnell, Raleigh Chinn, Kinzua Corporation, Alvin Schwager, E. W. Stuchell, D. E. Wyman, M. H. Wyman and Bryant R. Dunn.

INDEX

Page

Page

Page

CITATIONS

Cases

Page

Cases

Page

Cases

Page

Cases

Texts

No. 15669

United States Court of Appeals
For the Ninth Circuit

HARRY JOSEPH, *Appellant,*

vs.

DONOVER COMPANY, INC., a corporation; HARRY J. O'DONNELL; RALEIGH CHINN; KINZUA CORPORATION, a corporation; MARK F. MATHEWSON and RICHARD K. BUSH, Trustees in Dissolution of CAPITAL TIMBER PRODUCTS COMPANY, a corporation; CAPITAL TIMBER PRODUCTS COMPANY, a corporation; ALVIN SCHWAGER; E. W. STUCHELL; D. E. WYMAN; M. H. WYMAN, and BRYANT R. DUNN, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

BRIEF OF APPELLEES

STATEMENT OF THE CASE

This is an action for "imposition of a trust."[1] It is based upon appellant's claim of the "existence of a joint venture agreement between plaintiff [Joseph] and Harry O'Donnell and his group . . . "[2] Appellant, *assuming* that such a joint venture agreement existed, contends that O'Donnell violated fiduciary obligations arising thereunder. His sole basis for the imposition of

[1] Appellant's Opening Brief, p. 1.

[2] *Id.* at p. 7.

a constructive trust is the alleged breach of such *assumed* obligations.

The jurisdiction of the district court was based upon diversity of citizenship[3] and it was stipulated at the trial that the substantive features of the case were controlled by Oregon law.[4] It was also stipulated that the issues of laches and speculative delay were to be determined by Washington law.[5]

Prior to the actual trial in the court below the trial judge, the Hon. George H. Boldt, signed an order separating the trial of the issue of whether O'Donnell was liable to Joseph from the trial of the issues of whether the other appellees were liable to him.[6]

The initial issue in the court below was whether as a matter of fact an agreement of joint venture, express or implied in fact, did or did not exist between Joseph and O'Donnell. For if no such agreement existed *as a matter of fact,* no fiduciary obligations could arise *as a matter of law.* In such case there would be no fiduciary obligations for O'Donnell to breach and Joseph's action would automatically fail. Thus in the first instance the resolution of the case depended upon a *choice between conflicting fact premises, i.e.,* whether *in fact* a

[3] Findings of Fact I (R. 246), Admitted Fact I (R. 154).

[4] Colloquy (R. 944-5), Preamble to Findings of Fact (R. 245).

[5] Appellant's Opening Brief, p. 85.

[6] Order for Separate Trial of Issue and Limitation of Scope of Discovery Proceedings (R. 135, 136). Since none of the defendants, except O'Donnell, had any direct relationship with Joseph, their liability to him could arise, if at all, only through O'Donnell; and if O'Donnell, himself, was not liable to Joseph it would follow that none of the other defendants would be liable to him. Cf. Conclusions of Law X, (R. 282). That is the reason the court separated the trial of issues and ordered the issue of O'Donnell's liability to be tried first.

joint venture agreement did or did not exist between Joseph and O'Donnell. Joseph claimed it did; O'Donnell, it did not. Therein lay the crux of the matter.

The trial court's determination of *which* fact premise was credible necessarily was based upon the record made in the trial below.

The trial commenced on September 24, 1956, and continued through October 5, 1956 (R. 306-1573) when, due to prior commitments of the trial court, it was adjourned (R. 1573). It reconvened on November 21, 1956 and continued through November 27, 1956 (R. 1573-2048) when appellant rested (R. 2035). The trial of appellant's case consumed 14 days of actual trial, during which 10 witnesses testified in person and 18 depositions (including 6 of witnesses who testified in person) and some 340 exhibits were admitted in evidence. Appellant Joseph testified for some 4 days and his testimony covers some 475 pages of the printed record. Appellee O'Donnell also testified for some 4 days and his oral testimony covers approximately 524 printed pages. Appellee Chinn testified for almost 2 days, as did the witness Samuel Terman[7] and their testimony consists of approximately 212 and 232 pages, respectively. The entire record herein consists of 9 printed volumes, aggregating 4,266 printed pages of which approximately 1710 consist of oral testimony, interspersed, of course, with usual colloquy.

At the close of appellant's case, the appellees made their motions to dismiss under rule 41(b), Federal

[7] Terman had a direct interest in the outcome of the case; he claimed a $600,000 broker's fee by an agreement with Joseph, the collection of which depended upon Joseph's success in this case.

Rules of Civil Procedure (R. 2035-6). The trial court indicated that it desired to give them careful consideration.[8] Appellant's counsel stated he was "in accord with your [the court's] thinking on that point"[9] (R. 2039); but he asked for 40 days additional time to organize the "vast amount of evidence and exhibits" so that he could "present a printed document . . . with suggested findings of fact related to the evidence, and analyze the propositions of law with an attached brief" (R. 2039-41). Because of counsel's request the court

---

[8] The trial court said (R. 2037-8):

"Ordinarily, on a motion for dismissal at the end of the plaintiff's case, I somewhat summarily dispose of the motion with the view of hearing all the evidence. This case, however, is extraordinary in several particulars.

"In the first place, most, if not all, of the adverse parties have been interrogated at very great length and in great detail concerning the transactions in question, and, accordingly, the evidence of all the principals almost without exception, is before me.

"Rule 41-b provides, among other things, in an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment, and so on. The rule thus specifically authorizes the court in a non-jury case to weigh the evidence and find the facts, if the court feels that the evidence is in a posture for that. The cases under 41-b fully support the specific rules stated in the Rule 41-b that I have just read.

"For these reasons and others that are not now necessary to mention, I think it desirable that we have and hear full argument on the motion at this time. Now, recognizing that this is perhaps something you had not anticipated, I propose to suspend at this time if you desire it. If you do not desire it, we will go ahead, suspend at this time, and reconvene on Thursday and devote as much or as little of that day as may be necessary for a full presentation of whatever argument you each desire to make."

[9] Mr. Clinton said (R. 2039):

"I am very much persuaded that your Honor's view, that this case is properly one for a disposition at this point, is a sound one. I think your Honor is going to either decide one way or another based on the evidence in this case at this point, and nothing that you will hear hereafter will effect that ultimate judgment, so, therefore, I am in accord with your thinking on that point."

suspended further hearing until December 28, 1956 (R. 2046). It was stipulated between counsel for all parties that appellees would serve and file a written memorandum by December 12, and that appellant would do so by December 21 (R. 2048). Such memoranda were exchanged and filed as stipulated and oral arguments were heard on January 18, 1957 (R. 234-5).

On January 18, 1957, the trial court rendered its oral memorandum decision (R. 4246-63) granting appellees' motion to dismiss appellant's action "on the merits and with prejudice" (R. 4263). After granting extensions of time for filing proposed findings of fact and conclusions of law, as well as objections thereto, the trial court on March 22, 1957, rejected appellant's proposed findings and conclusions (R. 243-4) and took appellees' proposed findings and conclusions under advisement (R. 244). After making changes therein, the court signed formal findings of fact and conclusions of law (R. 244-82) and caused the same to be filed on June 3, 1957 (R. 282). The judgment of dismissal was signed and filed the same day (R. 283-4).

The trial court found that Joseph and O'Donnell, *in fact,* were not and never had been joint adventurers. Epitomized, the court's findings were:

1. That no express agreement existed between Joseph and O'Donnell;[10]
2. That there existed between them no agreement of joint venture, implied either from their actions alone or from their actions in combination with

[10] Trial Court's Memorandum Decision (R. 4254-7); Findings of Fact V(1), V(5), XIII (R. 250, 252, 273-5).

their express words; contrariwise, the court found that their actions actually negated the existence of a joint venture agreement between them;[11]

3. That if any relationship existed between them it was terminated, as a matter of fact, "at or about the end of March of 1953 . . . and that at the very least under the circumstances O'Donnell had a right to believe that it was [terminated]";[12] and
4. That Joseph as a matter of fact speculatively delayed asserting any claim against appellees for 20 months after Kinzua was acquired by them, during which period the venture was fraught with peril, and he in fact asserted his claim only after he was certain the venture "would prove profitable";[13] accordingly, the court concluded that appellant was estopped, by reason of laches, to assert any claim against appellees, if any he had.

Since the court below found as a matter of fact that no agreement existed between Joseph and O'Donnell, it had no occasion to consider whether the "claimed" agreement was a valid *contract* of joint venture in point of law;[14] in its oral memorandum decision it said:[15]

---

[11] Trial Court's Memorandum Decision (R. 4257-61); Findings of Fact V(1), V(5), XIII (R. 252-3, 273-5).

[12] Trial Court's Memorandum Decision (R. 4261, 4262). Therein the court said: " . . . whatever the relationship between Joseph and O'Donnell was—*I am confident it was not joint venture or contract of any kind*—but whatever it was, it was terminated at or about the end of March of 1953." (Emphasis supplied.) Cf. Findings of Fact XIII(7), (R. 275).

[13] Trial Court's Memorandum Decision (R. 4262, 4263); Findings of Fact XIV, XV, XVI (R. 275-80).

[14] We use the word, "agreement," advisedly; we do not use it as a synonym for "contract." This distinction is pointed out by Judge Learned Hand in *Great Lakes Transit Corp. v. Marceau*, 2 Cir. 1946, 154 F.2d. 623, 627: " . . . the parties can make agreements, but they cannot

> " . . . I am not going to discuss the matter of consideration or any other particular *negativing contract,* because in my judgment the first essential element of the case, that is, *agreement* to make a joint purchase, is lacking." (Emphasis supplied)

In its oral memorandum decision (R. 4246-63) the trial court explained *how* it reached its factual and legal conclusions; and in its formal Findings of Fact (R. 244-80) it set forth *chronologically* the *particular* facts found followed by the *factual inferences* drawn therefrom. For this court's convenience the trial court's oral memorandum decision is set forth under separate cover as Appendix I and its Findings of Fact and Conclusions of Law are set forth as Appendix II. In Appendix II we have documented the findings to the record itself, thereby demonstrating that each of them is supported by competent, substantial and credible evidence. So documented the Findings of Fact speak for themselves. We adopt them as our statement of facts herein.

Appellant states 6 points upon which he claims to rely upon this appeal:[16]

---

make contracts; only the law of the place where they agree can do that." Cf. *Preston v. State Industrial Accident Commission*, 1944, 174 Or. 553, 149 P.2d 957, 961, wherein the Oregon Supreme Court said that the existence of a joint venture depended upon: "What is the *actual* character of the relationship intended *in point of fact* and does that relationship amount to a partnership *in point of law?*" (Emphasis supplied.) Since the trial court found that no *agreement* existed *in fact* it had no basis for determining whether the agreement appellant claimed to exist was a *contract* of joint venture *in point of law.* Elsewhere we shall show that the *agreement* appellant claims existed is not a *contract* of joint venture *under Oregon law.*

[15] (R. 4259).

[16] Statement of Points on Appeal (R. 287, 288); Appellant's Opening Brief, p. 2.

1. The Findings of Fact do not support the Conclusions of Law and Judgment;
2. The Findings of Fact are "contrary to the evidence and clearly erroneous";
3. The evidence established a joint venture between Joseph and O'Donnell;
4. The court erred in dismissing plaintiff's action;
5. The court erred in granting defendant's motion to dismiss; and
6. The court erred in limiting plaintiff's discovery proceedings to the issue of the liability of defendant O'Donnell.

Point 6 is not argued at all in appellant's brief;[17] and point 1, if argued at all, is not argued separately from other points. Points 2 through 5 are argued collectively. Basically, then, appellant makes but a single argument: That the trial court's findings of fact are contrary to the evidence and clearly erroneous.[18]

---

[17] Cf. *Rystad v. Boyd*, 9 Cir. 1957, 246 F.2d 246, 248; *Peck v. Shell Oil Co.*, 9 Cir. 1944, 142 F.2d 141, 143.

[18] Thus, in the last paragraph of his "Statement of the Case," appearing on page 7 of his Opening Brief, appellant says:

"This appeal followed in due course, based in large measure on the insufficiency of the facts to support the findings, and of the findings to support the judgment that there was no joint venture or that it was terminated, or that plaintiff was barred by laches. These findings, and the judgment based thereon, are urged to be clearly erroneous as contradicting the evidence, including many admissions of the defendants themselves."

SUMMARY OF ARGUMENT

The issues on this appeal, as in the court below, are fact issues. They require a determination, in the first instance of whether *as a matter of fact* Joseph and O'Donnell were or were not joint adventurers. The trial court found they were not. They require a further determination whether, if any relationship ever existed between appellant and O'Donnell, it had, *as a matter of fact,* been terminated. The trial court found that it had been. Finally, they require a determination of whether, *as a matter of fact,* appellant speculatively delayed asserting a claim against appellees. The trial court found that appellant had.

On this appeal appellant argues generally that the findings of fact of the trial court are contrary to the evidence and clearly erroneous, but he does not specify the particular finding or findings to which he objects.

For the court's convenience, we set forth under separate cover as Appendix I the trial court's memorandum decision explaining how it reached its factual and legal conclusions. As Appendix II we set forth the trial court's formal findings of fact and conclusions of law. In Appendix II we have carefully documented the trial court's findings of fact to the record itself, thereby demonstrating that all of them are supported by substantial, credible and competent evidence. The court's memorandum opinion and its findings of fact and conclusions of law are set forth under separate cover so that they may be more conveniently used by the court in connection with its own analysis of the record and of the briefs.

Since the findings are supported by substantial, credible and competent evidence, we think that appellant's appeal should be dismissed at this point without further consideration. Because of the nature of appellant's brief, however, we feel the court may desire further argument.

Under Section I of the brief itself, we review the Oregon law of joint venture. Therein we demonstrate that a joint venture relationship simply cannot arise by implication of law. Under Oregon law the relationship of joint adventurers is a definite, legally enforceable relationship, created only as a result of voluntary contract of the parties expressed or implied *in fact*. The joint venture contract here alleged to exist is a bilateral contract with each of the parties being both a promisor and a promisee. The requisites for a valid contract of joint venture are identical with those of other contracts. Under Oregon law the promises of the parties to create a bilateral contract of joint venture must be sufficiently definite with respect to essential terms that a court can determine what each promised. If essential promises are vague, indefinite or uncertain or if any essential term of the alleged contract is reserved for future negotiation or agreement no valid contract of joint venture is created. For the Oregon courts will not fill in the terms of the agreement for the parties if they have failed to do so themselves. And this is true with respect to implied *in fact* contracts as well. If the contract is to be implied in fact from the acts of the parties, the court must be able to determine definitely the obligations or promises of each, as well as each and every other element requisite to a valid bilateral con-

tract. Where, as here, the alleged contract is in its executory stages, a heavy burden of proof rightfully falls upon the party claiming its existence. In each case the basic question under Oregon law is whether or not the parties intended to and did make and assent to reciprocal promises, what the promises were, if made, and how the making of them was outwardly manifested by each party to the other.

In Section II, we demonstrate that the burden of proving the alleged contract of joint venture is upon the party asserting its existence. Where the alleged joint venture contract is claimed to be the basis for the imposition of a constructive trust, each and every element of that contract must be established by strong, clear and convincing evidence.

In Section III, we demonstrate that the findings of fact of the trial court, particularly where they are based upon conflicting evidence, are presumed to be correct and that this court should not in such case substitute its own findings for those of the trial court. Here the trial court's findings of fact were necessarily concerned with imponderables such as the intentions of the parties and factual inferences. These are fact findings pure and simple and, being supported by substantial competent evidence, they should not be disturbed. Under the decisions of this court and the Supreme Court of the United States, Rule 52(a), Federal Rules of Civil Procedure, applies with particular force to findings concerned with imponderables such as the intentions, designs and motives of parties with respect to acts and occurrences which took place three or more

years before the trial in the court below. In such case this court should not retry the case *de novo*.

In Section IV, we demonstrate that the appellant may not fabricate a legal issue out of the purely factual matters here involved by erroneously labeling evidence as "admissions," "undenied evidence" and "documentary evidence." The "documentary evidence" makes no mention of any agreement of any kind between Joseph and O'Donnell; hence such evidence is concerned solely with matters collateral to the existence or non-existence of a contract of joint venture. The matters which appellant's counsel label "admissions" are not admissions at all. Except for relatively unimportant details, entirely consistent with the *non-existence* of a joint venture contract, the matters labeled as "admissions" and "undenied evidence" are largely oral testimony of interested parties upon which appellant's counsel place their own erroneous interpretation. The testimony and evidence forming the basis of the claimed "admissions" and "undenied evidence" are entitled to no special sanction. They were subject to evaluation, or even rejection, by the trial court, and were required to be viewed by it in their proper setting together with all other evidence in the light of the credibility of the witnesses. And where, as here, they were evaluated by the trial court and entered into a finding of fact, that finding may not be disturbed unless clearly erroneous.

In Section V, and subsequent sections, we review the record made in the court below. We first point out that the keystone of appellant's case, which is the false as-

sumption of his counsel that an express contract of joint venture was created during appellant's and O'Donnell's November 18, 1952 meeting in Portland, is missing because the credible evidence demonstrates that no words were uttered or assented to creating an express contract.

Moreover, no contract of joint venture was created by implication from the conduct of appellant or O'Donnell, nor by a combination of both their words and conduct. Until they were able to learn what was for sale, neither could know whether he had any interest in negotiating for the acquisition of Kinzua. This knowledge of appellant and O'Donnell was not obtained during the purely exploratory meeting in Portland on November 19, 1952. O'Donnell did not acquire such basic preliminary information until mid-April, 1953, by which time appellant had advised O'Donnell that whatever interest he had was with A. C. Allyn, a Chicago investment banker. Appellant's lack of knowledge concerning Kinzua and his obvious financial inability to make his claimed investment interest completely belie his story of a Portland agreement or any subsequent joint undertaking with O'Donnell to acquire Kinzua.

We further discuss in Section V the relationship of appellant and his broker friend Terman. Terman has a direct interest in this lawsuit and his hearsay testimony and memoranda, organized, and in many instances created, for use in this case, are completely untrustworthy and discredited.

In Section VI, we analyze the claimed "admissions" of O'Donnell, the ballooned exhibits appearing at pages

59 and 60 of appellant's brief, and the documentary evidence which counsel claim support the existence of a joint venture. The so-called "admissions" of O'Donnell are not admissions at all, and the ballooned exhibits and appellant's other documentary evidence neither establish, nor tend to establish, the existence of a joint venture between appellant and O'Donnell. To the extent that they are relevant at all, they are concerned with collateral matters. The so-called documentary evidence, consisting of self-serving memoranda of Joseph, were not made contemporaneously with the events they purport to cover, and, for this and other reasons, are incredible and untrustworthy .

In Section VII, we demonstrate that neither O'Donnell nor the other appellees who were interested in Kinzua at the time of Allyn's withdrawal, were unjustly enriched, or otherwise benefited, by reason of Allyn's replacement by Webster.

In Section VIII, we demonstrate that if any relationship ever existed between appellant and O'Donnell with reference to Kinzua, it had terminated long prior to Kinzua's purchase by appellees. From December 30, 1952, when appellant discussed Kinzua with A. C. Allyn, appellant indicated no interest in Kinzua to O'Donnell, except such as he might with the Allyn group. Although he did not indicate clearly what that interest might be, Allyn had the impression that appellant was looking for a finder's fee or commission. In any event, appellant's actions and inaction from December 30, 1952, forward caused O'Donnell to believe,

and he did believe, that appellant had no interest in Kinzua independent of his interest with Allyn. When Allyn withdrew his interest in Kinzua, all interest of appellant ceased. Appellant is estopped to assert his present claim against O'Donnell or the other appellees.

In Section IX, we demonstrate that appellant speculatively delayed asserting any claim against appellees during the period of greatest hazard to their investment, and he in fact asserted a claim only after it was obvious to him that appellees' investment had proved to be successful. By reason thereof appellant's claim is barred by laches under Washington law.

In Section X we compare the credibility of appellant and O'Donnell. Despite the trial court's finding that O'Donnell was an entirely trustworthy witness, appellant's counsel continue their attempted vilification of him on this appeal. Because of the scurrilous nature of their attack, we believe it should not go unanswered. In this section we demonstrate that O'Donnell's testimony was honest and worthy of belief, and that his actions were honorable and forthright. The testimony O'Donnell gave at the trial was in all important aspects consistent with that given during the taking of his deposition. On the other hand, appellant's testimony at the trial varied in important aspects from that given at his deposition and was, as the trial court found, untenable and incredible.

Finally in point XI we demonstrate, arguendo, that even under appellant's version of the facts, no contract of joint venture existed between him and O'Donnell under Oregon law. Appellant's counsel's claim of

a contract of joint venture is based upon their own false assumptions and specious inferences drawn therefrom. The claimed promises upon which appellant's counsel rely to establish a contract of joint venture are wholly illusory and they are entirely too vague, indefinite and uncertain with respect to essential terms to create a contract of joint venture under Oregon law. They were, in fact, not promises at all.

ARGUMENT

I.

Analysis of Basic Issue Under Oregon Law

A. Basic Issue—Did Joseph and O'Donnell Enter Into a Contract of Joint Venture?

Despite the length of the record the issues of this case are quite simple if resort is made to basic principles. Joseph's action is based solely upon his claim of a breach of alleged fiduciary obligations arising from an *assumed* joint venture between himself and O'Donnell. But, as we heretofore pointed out, if that relationship did not exist, as the trial court found it did not, no fiduciary obligations could arise therefrom and hence there were none for O'Donnell to breach. The basic issue, then, is whether Joseph and O'Donnell did or did not occupy the relationship of joint adventurers with each other.

During the trial it was stipulated that this case, being one of diverse citizenship, was controlled by Oregon law (Colloquy, R. 944-5, Preamble to Findings of Fact, R. 245). Accordingly, the basic issue is whether

Joseph and O'Donnell were in fact joint adventurers under Oregon law.

Under Oregon law, as elsewhere,[19] the legal relationship of joint adventurers " . . . is the product of *voluntary contract* express or implied." *Preston v. State Industrial Accident Commission,* 1944, 174 Or. 553, 149 P.2d 957, 961. If, in fact, there is no *voluntary contract* between the parties they are not joint adventurers. *Preston v. State Industrial Accident Commission, supra; Reed v. Montgomery,* 1947, 180 Or. 196, 175 P.2d 986; *Bogle v. Paulson,* 1949, 185 Or. 211, 201 P.2d 733; *Burnett v. Lemon,* 1948, 185 Or. 54, 199 P.2d 910. The *actual character* of the alleged relationship must be ascertained *as a matter of fact* before the *legal* relationship can be determined. In the words of the Oregon Supreme Court,[20] the question in each case where the existence of a joint venture is claimed is:

> "What is the *actual character* of the relationship intended *in point of fact* and does that relationship amount to a partnership [joint venture] *in point of law?*" (Emphasis supplied)

---

[19] 30 Am. Jur., Joint Adventures, §7, p. 943:

"As between the parties, although not necessarily as to third persons, a contract is essential to create the relation of joint adventures. The sine qua non of the relationship of joint adventure is a contract, express or implied. As a legal concept, a joint adventure is not a status created or imposed by law, but is a relationship voluntarily assumed and arising wholly ex contractu. As in contracts generally, the essence of a joint-adventure contract is that it binds the parties who enter into it, and, when made, obligates them to perform it, and failure of any of them to perform constitutes, in law, a breach of contract."

[20] *Preston v. State Industrial Accident Commission,* 1944, 174 Or. 553, 149 P.2d 957, 960.

In this case the Oregon court uses the term " 'partnership' as if inclusive of 'joint adventure,' " because "the rules and principles applicable to a partnership relation govern and control the rights, duties, and obligations of the parties as to each other." (At p. 960.)

B. Joint Venture Contract Cannot Arise by Operation of Law

Since, under Oregon law, a joint venture can be created only by a voluntary contract between the parties, a joint venture as between themselves can never arise by operation of law.[21] *Burnett v. Lemon,* 1948, 185 Or. 54, 199 P.2d 910, 915; 30 Am. Jur., Joint Adventures, §7, p. 943; 48 C.J.S., Joint Adventures, §3, pp. 816, 817. Thus, even though a contract of joint venture may be implied as well as expressed, if such a contract is to be implied at all, it can be implied only as a matter of fact. For such an implied in fact contract is a true contract in every sense, and the elements requisite to its existence are identical to those of express contracts. 1 Williston on Contracts, Third Edition, §3, p. 11. Such an implied in fact contract is distinctly different from an implied in law, or quasi contract. Professor Williston points out:

> "It is important to distinguish between quasi contracts and contracts implied in fact, . . . because of the difference in the legal relations which

---

[21] In *Burnett v. Lemon,* 1948, 185 Or. 54, 199 P.2d 910, 915, the Oregon Supreme Court said:

"Here we are not concerned with a case wherein a third person is seeking to establish liability against a partnership by reason of the conduct of the alleged partners in holding themselves out to the public as having such relationship. The distinction between that case and the other one under consideration is thus clearly stated in Watson v. Hamilton, 180 Ala. 3, 60 So. 63:

" 'On the question whether the parties are partners inter se, the interest of no third person being involved, stronger proof is required to establish the partnership than when the question arises as between the alleged partners and third persons. A partnership as to third persons may arise by mere operation of law against the parties by way of estoppel, etc.; but as between the parties themselves it only exists when such is their actual intention.' "

> may be involved under a true contract and those imposed by law under the name of a quasi contract. Quasi contractual obligations are imposed by law for the purpose of bringing about justice without reference to the intention of the parties. . . . On the other hand, a true contract cannot exist, *however desirable it might be to have one,* unless there is a manifestation of assent to the making of a promise." (Emphasis supplied) 1 Williston on Contracts, Third Edition, §3a, pp. 12, 13.

We think appellant *assumes now* that on November 18, 1952 he intended to become a joint adventurer with O'Donnell, although neither he nor O'Donnell *then* did anything to commit himself to the other. From the *assumption* that Joseph *then* intended to become a joint adventurer with O'Donnell he *now concludes* that they *then* must have made mutual promises imposing fiduciary obligations on each to the other. And finally *assuming now* that such fiduciary obligations existed *then,* he reasons that he and O'Donnell must have intended to become joint adventurers in the first place, and hence a contract of joint venture should be *implied* to have been created *then.*

But this is reasoning by label.[22] It assumes that the relationship creates the promises, not the promises the relationship.

---

[22] Cf. *Las Vegas Machine & Engineering Works v. Roemisch,* 1950, 67 Nev. 1, 213 P.2d 319, 321:

> " . . . *we cannot determine the rights of the parties to this contract simply by giving it a name.* [Citation.] As with other contracts, the intention of the parties (no rights of third parties being involved) must be determined from the instrument itself if this can be done. *'There is no principle of hermeneutics of peculiar application to articles of copartnership. They are construed by the ordinary rules for interpreting written contracts.'* Walker v. Patterson, 166 Minn. 215, 208 N.W. 3, 7." (Emphasis supplied.)

C. Basic Requisites of Joint Venture Contract Same as Other Contracts

The basic requisites for the validity of a joint venture contract are no different from those of other contracts.[23] *Greenley v. Janesville Mills,* 7 Cir. 1953, 204 F.2d 526, 528; *Kislak v. Kreedian,* 1957, Fla., 95 So.2d 510, 515; *Mason v. Rose,* 2 Cir. 1949, 176 F.2d 486; 48 C.J.S., Joint Adventures, §3, p. 816, *et seq.* Nor are the requisites different because the alleged contract of joint venture is one to be implied in fact. *Kislak v. Kreedian,* 1957, Fla., 95 So.2d 510, 515. In such implied in fact contracts, as in express contracts, each element essential to the existence of a valid contract must be shown *to exist in fact.* The only difference is in the *method* of proof; and where, as here, the alleged contract if it exists at all, is in its executory stages, the quality and degree of proof as to each element must be clear and convincing. Thus the Florida Supreme Court said in *Kislak v. Kreedian, supra*:

> "The Courts, including this Court, have held that while such contracts [of joint venture] may be expressed or *implied,* the use of the word 'implied' does not relieve one who alleges the existence of such a relationship of the burden of both alleging and proving that an agreement or contract supports the relationship *as well as every element*

---

[23] *In Greenley v. Janesville Mills,* 7 Cir. 1953, 204 F.2d 526, 528, the Seventh Circuit said:

" . . . Recognizing the uncertainty of this contract, plaintiff argues that we must look upon it as a joint venture whereby the parties were to profit or to lose in equal proportions. *But we can apprehend of no reason why a joint venture agreement should lend itself to any different construction than that accorded any other contract.*" (Emphasis supplied.)

necessary to be embraced within the concept of a contract. Moreover, where, as in this case, the events and transactions which form the basis of the alleged relationship are not in writing, the burden of establishing the existence of such contract, including all of its essential elements, is indeed, as it should be, a heavy and difficult one. Business relationships are not customarily entered into in a casual manner. This is particularly true as to those involving the magnitude of that under discussion. The very fact that the agreement was not reduced to writing is evidence, however slight, that no such agreement actually existed. This is especially true in those cases where, as here, the alleged relationship is either in its executory stages or has not actually commenced to function to the extent that the actions of the parties themselves may tend to establish the validity of the assertion that such agreement existed." (Emphasis supplied)

1. No promises, no contract

Stripped of extraneous verbage then, the simple issue in this case is whether each of the elements requisite to the creation of a valid contract exists as a matter of fact.

By definition, a "contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement, Contracts, 1932, §1, p. 1. *The promise must exist as a fact before the contract can be declared;* for without a promise there is no contract. *It is the promise that creates the contract*— not the contract, the promise.

In this case the contract appellant claims existed

between Joseph and O'Donnell obviously was bilateral, requiring *mutual* promises between them, each being both a promisor and a promisee. Restatement, Contracts, §12, p. 10.

Concretely the first fact question is: *Did Joseph and O'Donnell make promises each to the other?* If the answer is that they did not, as the trial court found, no contract of joint venture was created. Hence, the parties were not joint adventurers and Joseph's claim automatically fails. In this posture of the case, discussion of any other question, factual or legal, becomes wholly academic.

On the other hand, if the answer is that Joseph and O'Donnell did make promises, each to the other, then it becomes necessary to determine as a matter of fact exactly *what* each of them promised. For while, by definition, promises by each to the other are essential to the existence of a bilateral contract, not all promises create such a contract; they may be vague and indefinite, illusory, gratuitous, lack mutuality, or may be insufficient otherwise to create a binding contract.

2. Exploratory negotiations do not create a contract of joint venture

Thus under Oregon law, as elsewhere, exploratory negotiations looking to the formation of a joint venture relationship in the future will not result in a present contract of joint venture. For to create a valid contract of joint venture there must be an outward manifestation that the minds of the parties have met upon all of the material terms of the supposed contract; their promises must show that both parties assented to the

same thing in the same sense. *Reed, et al., v. Montgomery,* 1947, 180 Or. 196, 175 P.2d 986, 996. If any material term is reserved for future exploration, negotiation, or agreement there is no contract between the parties until the term so reserved is agreed upon by the parties themselves; for the Oregon courts will not "fill out the agreement for the parties" where they, themselves, have failed to do so.[24] *Reed v. Montgomery,* 1947, 180 Or. 196, 175 P.2d 986, 997; *Slayter v. Pasley,* 1953, 199 Or. 616, 264 P.2d 444, 449; *Holtz v. Olds,* 1917, 84 Or. 567, 577, 164 Pac. 583, 586. And this is particularly true where, as here, large and complicated business and financial transactions are involved. *Reed v. Montgomery, supra,* p. 996; *Mason v. Rose,* 2 Cir. 1949, 176 F.2d 486; *Brown v. Bivings,* 1954, Okla., 277 P.2d 671; *Kislak v. Kreedian,* 1957, Fla., 95 So.2d 510; *Biothermal Process Corp. v. Cohu & Co.,* 1953, 283 App. Div. 60, 126 N.Y.S.2d 1, aff'd. 308 N.Y. 689, 125 N.E.2d 323; *American Mining Co. v. Himrod-Kimball Mines Co.,* 1951, 124 Colo. 186, 235 P.2d 804.

---

[24] In *Slayter v. Pasley,* 1953, 199 Or. 616, 264 P.2d 444, 449, the Oregon Supreme Court said:

"We should be hesitant about completing an apparently legally incomplete agreement made between persons *sui juris* enjoying freedom of contract and dealing at arms' length by arbitrarily interpolating into it our concept of the parties' intent merely to validate what would otherwise be an invalid instrument, lest we inadvertently commit them to an ostensible agreement which, in fact, is contrary to the deliberate design of all of them. It is a dangerous doctrine when examined in the light of reason. Judicial paternalism of this character should be as obnoxious to courts as is legislation by judicial fiat. Both import a quality of jural ego and superiority not consonant with long-accepted ideas of legistic propriety under a democratic form of government. If, however, we follow the urgings of the lessee in the instant matter, we will thereby establish a precedent which will open the door to repeated opportunities to do that which, in principle, courts should not do and, in any event, are not adequately equipped to do."

3. Mutual assent essential and must be manifested by each party to the other

Finally, not only must parties to bilateral contracts have made promises sufficiently definite to enable a court to determine what was promised by each and whether the promises made covered all the material terms of the contemplated agreement; additionally the promises so made must have been *outwardly manifested* by each party to the other. Thus in the Restatement of Contracts, §20, Comment A, it is said: "Mutual assent to the formation of informal contracts is operative only to the extent that it is manifested." And Professor Williston says, 1 Williston on Contracts, Third Edition, 1957, §22, pp. 46, 47:

> "It is customarily said that mutual assent is essential to the formation of informal contracts, but it should be further stated that the mutual assent *must be manifested by one party to the other,* and *except as so manifested is unimportant.* . . . In the formation of contracts it was long ago settled that secret intent was immaterial, only *overt acts* being considered in the determination of such mutual assent as that branch of the law requires." (Emphasis supplied)

Thus to be effective, manifestation of assent by the promisor must be known to the promisee. Again Professor Williston says, *id.* at pp. 48, 49:

> "Not only must assent to a contract be manifested by overt acts, but *promises in contracts must be made* by manifestation of agreement moving from the promisor *to the promisee.* . . . A promise *necessarily* implies either *communication* from the promisor to the promisee, or at least *some ac-*

tion which will normally *indicate to the promisee* the intent of the promisor." (Emphasis supplied)

Since the contract here claimed to exist is bilateral, with each party being both a promisor and a promisee, it was essential to its existence that the words or acts outwardly manifesting the assent of each have been communicated or made known to the other. Absent such communication or knowledge by either or both, there is, of course, no contract.

Applied here, this principle is by no means academic. Since there was no written agreement between Joseph and O'Donnell, the fact question of whether they did or did not assent to reciprocal promises to each other, either expressly or by implication from their conduct, must necessarily be determined from their own words and acts. In determining what these were, the court was largely dependent upon their own testimony and to a considerable extent that of Chinn, who was present in Portland when appellant's counsel claim an express contract was created between Joseph and O'Donnell. The rest of the record largely covers collateral facts concerned primarily with imponderables such as intentions of the parties and the credibility of witnesses.

As we hereafter show, the entire record, both that portion which bears directly upon Joseph's and O'Donnell's own words and acts as manifested to each other, as well as the portion dealing with collateral facts, fully supports appellees' position. Objectively evaluated it permits of only one conclusion—that no agreement was ever reached as a matter of fact between Joseph and O'Donnell.

For the most part appellant's counsel do not meet the simple fact issues directly. Their opening brief is concerned largely with collateral matters. But even these they argue obliquely and circuitously; and in so doing, they pile false assumption upon false assumption and specious inference upon specious inference to the point of complete fantasy.[25]

Illustrative of the collateral nature of counsel's argument is their complaint appearing on page 4 of their opening brief that:

> "The findings [of fact] do not bother to say a word, pro or con, regarding the results of Joseph's earnest and successful efforts to get together large amounts of financing in Chicago."

But the record is clear that *Joseph breathed not one word about his so-called efforts to O'Donnell.* Joseph so testified and so did O'Donnell (Joseph, R. 556; O'Donnell, R. 1646). Because the efforts of Joseph were uncommunicated to O'Donnell and were otherwise unknown to him, they could have no bearing on the initial question of whether Joseph and O'Donnell had

---

[25] Cf. *Harris v. Morse*, S.D. N.Y. 1931, 54 F.2d 109, 116:

"As Judge Thomas said in an admiralty case, the Baron Innerdale (D. C.), 93 F. 492, at page 493, in dealing with the question whether a plaintiff had sustained the burden of proof: 'Courts are required to examine, compare, analyze, infer, weigh, and strike the balance of probabilities; but they are not required to hazard opinions that a person has done wrong, without the presentation of intelligible and substantiated facts which tend to establish the accusation. *A question of fact may be refined to such a degree that an accurate solution is beyond any reliable intellectual process. At such point of mystification, the court is justified in holding that the libellant has not sustained the burden of proof; that the domain of reasoning has been passed, and that of pure surmise entered.*'

"That is a domain into which even a court of equity, in spite of its *sensitized conscience and its plastic practice, cannot properly pass.*" (Emphasis supplied.)

or had not made and assented to reciprocal promises each to the other. Since the trial court confined the limits of its determination to whether a contract of joint venture existed between Joseph and O'Donnell, those actions of Joseph, being completely unknown to O'Donnell, are entirely beside the point even *if* they actually occurred. Hence, no finding with regard to them was required, and if made, such finding would amount to nothing more nor less than unimportant surplusage. In such case, no finding by the District Court was required. *Kustoff v. Chaplin,* 9 Cir. 1941, 120 F.2d 551.[26]

To summarize, the basic issues before the trial court were simple fact issues. They required a fact determination of whether Joseph and O'Donnell intended to and did make and assent to reciprocal promises, what the promises were, if made, and how the making of them was outwardly manifested by each to the other. After reviewing the entire record, the trial court was unable to "find assent and agreement on minimum elements amounting to a legally enforceable contract" (R. 4258-9). The court said (R. 4254):

> " . . . I am completely satisfied that there were no express words of agreement passing between Joseph and O'Donnell which would amount in law to a contract. I cannot find that any such words were spoken by Joseph or, if so, that they were understood and assented to by O'Donnell."

The court further said (R. 4257):

---

[26] In *Kustoff v. Chaplin, supra,* at pp. 560-1, this court said:

" . . . It is well established that when the findings of fact actually made control the judgment, failure to find on other issues becomes immaterial. There was no reversible error in such failure to make findings."

"Now, let us go to the next point. Was there any course of conduct between these men that gave rise to the implication that they had a legally binding contract for a joint purchase of Kinzua? I have looked the evidence over from stem to stern and I can't find it. Of course, if you start with the *assumption* that they had an express agreement to that effect in the first place, then you can find support for the *assumption* in *isolated* parts of the conduct afterward; but if you don't start with that assumption, you can't find a contract in the course of conduct of the parties." (Emphasis supplied)

II.

Burden of Proof on Joseph; Strong, Clear, Convincing Evidence Required

Under Oregon law the burden of proving the facts essential to the creation of a contract of joint venture rests upon the person asserting its existence. *Preston v. State Industrial Accident Commission,* 1944, 174 Or. 553, 149 P.2d 957, 961; *Bogle v. Paulson,* 1949, 185 Or. 211, 201 P.2d 733, 740; *Burnett v. Lemon,* 1948, 185 Or. 54, 199 P.2d 910, 915; *Powell v. Powell,* 1947, 181 Or. 675, 184 P.2d 373, 381. And the burden is much greater when the suit is between the alleged adventurers themselves and the person seeking to establish the relationship relies upon an oral agreement, or the acts of the parties, or both. *Burnett v. Lemon, supra*; cf., *Bogle v. Paulson, supra.*

That burden of proof is not sustained, under Oregon law, by the introduction of evidence in the record "which is consistent with the existence of a partnership, but equally consistent with its non-existence." *Preston v. State Industrial Accident Commission,*

supra, p. 962.[27] Nor is it sustained on appeal, where the trial record was such that a "decision fortified by quotations from the record could be written either way"; for such an appeal "submits only questions of fact," and in that case the findings of the trial judge to the effect that no joint venture exists will be sustained, even though the testimony of the witness on which the finding was based was contradictory. *Bogle v. Paulson,* 1949, 185 Or. 211, 201 P.2d 733. In that case the Oregon court said at page 737:

> " . . . The appeal submits only issues of fact. If the appellant's testimony is believed, he and the respondent were joint adventurers in the timber transactions he described. If the respondent's testimony is true, his relation to the appellant with regard to the timber mentioned in the complaint was that of employer. Each supported his contention with evidence. A decision fortified by quotations from the record could be written either way. . . . The outcome of the case is dependent upon whether one believes the appellant or the respondent. Anyone who accepts the appellant's version will possibly feel that the respondent took advantage of a tip given to him by the appellant that the Smith Company was in the market for Grant

---

[27] In *Preston v. State Industrial Accident Commission,* 1944, 174 Or. 553, 149 P.2d 957, 961, the Oregon court said at page 962: "The mere introduction in evidence of some conduct which is consistent with the existence of a partnership, but equally consistent with its non-existence, does not necessarily raise an inference of partnership when the burden of proof is upon the plaintiff. In its most favorable aspect, the plaintiff's evidence rises only to the level of bare speculation."

Facts which are consistent both with the existence and non-existence of a supposed premise do not establish the validity of the premise. This is illustrated by the following false syllogism: "All rose bushes have thorns. This bush has thorns. Therefore this bush is a rose." This, we think, is a basic error of appellant's approach in this case.

> County timber and, through the use of the information, made a large profit. Those who accept the respondent's version will very likely believe that the appellant is endeavoring to reap where the respondent, and not the appellant, has sown. . . .
>
> "In endeavoring to persuade us to disregard the trial judge's appraisal of the evidence, the carefully prepared brief of appellant's counsel emphasizes the fact that the respondent, as a witness, at times employed terms and expressions that were vague, equivocal and contradictory."

Despite this argument, the trial court found *as a fact* that no joint venture existed. In upholding the findings of the lower court, the Oregon Supreme Court said at page 739, *et seq.,* of 201 P.2d:

> " . . . the respondent, upon being asked for a fact, gave his impression, and upon being asked for a conversation, did not repeat what he had heard but gave the substance. Not all truthful persons make good witnesses, and not all good witnesses are truthful. Many laymen of good character find it impossible to realize that a question that calls for the terms of a parol contract requires them to repeat what was said when the negotiations were under way, and not to give their conclusions. . . . Upon the witness stand, some persons are at their worst; to them it is a pillory.
>
> . . . . .
>
> "All that we have before us as a result of the trial which was held in the Circuit Court are the words that the witnesses uttered. Many times the countenance of the witness and the tale it tells are a more reliable index to the truth than the witness's tongue. The tongue is subject to the witness's studied volition, but his manner, his gestures, his

passions and the tone of his voice may be unwitting. A meditated, carefully thought-out answer, even though it dovetails perfectly with the rest of the witness's testimony, may be less convincing than testimony given readily and without delay by another whose answers do not always accord.

"We do not believe that the fact that the respondent at times contradicted himself requires a holding that his testimony is unsatisfactory. He may not have heard correctly the questions that were addressed to him; the shouted voice may have confused him; or, like many others, he may have been unable to transfer readily from his mind to his tongue the facts he wished to utter. It is evident that the trial judge believed him and did not attribute his defects as a witness to an absence of good character. We think that we ought to defer to the trial judge's appraisal of this witness."

Since in this case appellant seeks the "imposition of a trust" he can sustain his burden only by proof possessing *extraordinary* persuasiveness. For it is settled Oregon law that the Oregon courts will not impose a constructive trust "by parol unless the complainant sustains the burden of proof by strong, clear and convincing evidence." *Hughes v. Helzer,* 1947, 182 Or. 205, 185 P.2d 537, 545. In that case the Oregon Supreme Court said at page 545 of 185 P.2d:

" . . . this court has emphasized that in this particular sort of case the proof, in order to preponderate, must be of an *extraordinary persuasiveness.* Some of the cases, with the court's comments upon the character of the evidence required, follow: Sisemore v. Pelton, 17 Or. 546, 21 P. 667 (*clear, certain, and convincing*); Snider v. John-

son, 25 Or. 328, 35 P. 846 (*full, clear, and convincing*); Barger v. Barger, supra (*strong, clear, convincing, and indubitable*); Oregon Lumber Co. v. Jones, 36 Or. 80, 58 P. 769 (*clear, certain, and convincing*); Schwartz v. Gerhardt, 44 Or. 425, 75 P. 698 (*clear and convincing*); De Roboam v. Schmidtlin, 50 Or. 388, 92 P. 1082 (*clear and convincing*); Chance v. Graham, supra (*clear, explicit, and satisfactory*); Barnes v. Spencer, 79 Or. 205, 153 P. 47 (*clear, full, and convincing*); Coe v. Coe, 75 Or. 145, 145 P. 674 (*clear and definite*); Neppach v. Norval, 116 Or. 593, 240 P. 883, 242 P. 605 (*clear and unequivocal*); Smith v. Barnes, 129 Or. 138, 276 P. 1086 (*clear and highly cogent*); American Surety Co. of New York v. Hattrem, 138 Or. 358, 3 P.2d 1109, 6 P.2d 1087; Johnston v. McKean, 177 Or. 556, 162 P.2d 820, and Fox v. Maurer, 178 Or. 64, 164 P.2d 417 (*strong, clear, and convincing*)." (Emphasis supplied)

This is in line with the law generally. In this connection Prof. Bogert says:

"As with the proof of express and resulting trusts, so in the case of the establishment of constructive trusts, the courts have announced that they require 'clear and convincing' evidence. Other judicial expressions are even stronger in their demands. *'If the evidence is doubtful or capable of reasonable explanation upon a theory other than the existence of the trust, it is not sufficient to support a decree declaring and enforcing the trust.'* Sometimes the requirement is stated to be that the facts leading to the decree establishing the constructive trust must be proved 'by greater weight than the mere preponderance of the evidence,' or beyond a reasonable doubt." (Emphasis supplied)

3 Bogert, Trusts and Trustees, 1946, Part 1, §472, pp. 13-14.

If the rule were otherwise, a constructive trust could be imposed against the will of a constructive trustee with a lesser quantum of proof than that required to establish a voluntary express trust, a principle which, we think, could hardly be argued.

The "clear and convincing" rule applies to cases where the joint venture relationship is claimed as the basis of the constructive trust. In such cases each of the factual elements of the contract of joint venture must be proved by the same degree of proof. *Kislak v. Kreedian,* 1957, 95 So.2d 510, 515; *Coryell v. Marrs,* 1937, 180 Okla. 394, 70 P.2d 478; *Greenbaum v. Kirkpatrick,* W.D. Okla. 1955, 129 F.Supp. 648, 650, note 2; 48 C.J.S. §12h(3)(b), p. 859.

Thus, in *Coryell v. Marrs, supra,* the Oklahoma Supreme Court said:

> "Before this court can hold that the lease in question was bought . . . in violation of [a] joint adventure agreement existing at the time . . . and declare that an interest . . . is held in trust . . . the fact of the existence of a joint adventure at the time, and not one to take place at some future time under certain conditions, must be fully established as well as the fact that a lease on this particular land composed a part and parcel of the joint adventure agreement. The existence of a constructive or resulting trust must be proved by *clear, unequivocal* evidence. Boles v. Akers, 116 Okla. 266, 244 P. 182. *Until all these conditions are fully met with proper proof, this court would not be warranted in ordering an accounting as asked. . . .*" (Emphasis supplied.)

The same principle was stated by the Seventh Circuit in *Jacoby v. Shell Oil Co.,* 1952, 196 F.2d 855, a case in which the plaintiff complainant sought the imposition of a constructive trust based upon a breach of fiduciary obligations arising from the principal and agent relationship, the obligations in all respects being similar to those arising from a joint venture. In this case the Seventh Circuit said, at page 858:

> "Proof to establish a constructive trust must be clearly convincing and so strong and unequivocal as to lead to but one conclusion. If the evidence is doubtful or capable of reasonable explanation upon a theory other than the existence of a trust, it is not sufficient to support a decree declaring and enforcing the trust [Citing cases]. The rule is similar where an attempt is made to establish by parol evidence a fiduciary relationship as the basis of a constructive trust."

III.

This Court Should Not Substitute Its Findings for the Trial Court's

A. The Trial Court's Findings Are Supported by Substantial Competent Evidence

The essence of the trial court's findings was:

1. That Joseph and O'Donnell had not made and assented to reciprocal promises either expressly or by implication and hence no agreement of joint venture existed between them;

2. That if any relationship existed between them it was terminated, as a matter of fact, at or about the end of March, 1953, and at the very least, under the circum-

stances O'Donnell had a right to believe that it was terminated; and

3. That Joseph, as a matter of fact, speculatively delayed asserting any claim against appellees for more than 20 months after Kinzua was acquired by them, during which period the venture was fraught with peril, and he asserted his claim only after he was certain the venture would prove profitable; accordingly, the court concluded that appellant was estopped, by reason of laches, to assert any claim against appellees, if any he had.

Each of the trial court's findings of fact is supported by substantial and competent evidence. In Appendix II we have documented each and every one of them to the record itself.

B. Findings Concerning Parties' Intentions and Factual Inferences Are Findings of Fact

The initial basic issue in the court below was whether an agreement of joint venture existed between Joseph and O'Donnell. This, of course, involved a determination of their intentions, motives and designs. There were no writings between them which in any way referred to any agreement of any kind.

Hence, whether or not Joseph and O'Donnell intended to and did make reciprocal promises each to the other could be inferred only from their acts and words viewed in the circumstances in which they were expressed and performed.[28] This required not only a de-

---

[28]Cf. Judge Learned Hand in *New York Trust Co. v. Island Oil & Transport Corp.*, 2 Cir. 1929, 34 F.2d 655, 656:

"It is quite true that contracts depend upon the meaning which the

termination of what words and acts were expressed and performed, but a reconstruction of past events, many of which could be so reconstructed only by inference.[29] The testimony was highly conflicting both in regard to Joseph's and O'Donnell's words and acts and in regard to the circumstances in which they were spoken and performed.

Thus, Joseph testified that an express agreement was assented to by him and O'Donnell during their Portland meeting on November 18, 1952. Chinn, who was present at the meeting, testified that no agreement was entered into at that time. O'Donnell emphatically testified that he and Joseph reached no agreement of *any kind at any time,* either on November 18 or subsequently.

Thus, the court was called upon to weigh the evidence and judge of the credibility of the witnesses. This it had ample opportunity to do; for Joseph testified for approximately four days and his testimony covers some 475 pages of the printed record; O'Donnell also

---

law imputes to the utterances, not upon what the parties actually intended; but, in ascertaining what meaning to impute, the circumstances in which the words are used is always relevant and usually indispensable. The standard is what a normally constituted person would have understood them to mean, when used in their actual setting."

---

[29]In its oral memorandum decision, the trial court said (R. 4247):

"The reconstruction of past events, in the great majority of cases, at least, is not now an exact science nor is it ever likely to be, human nature continuing as it is. All that I can do in this position is to exercise such reason and judgment as I have, in the light of such experience as I have had, on such evidence as has been presented to me. Absolute certainty is an impossibility in this naughty world. The best we can do is to have a moral certainty, a reasonable certainty, which may vary according to the circumstances. In my own mind I have a certainty to that extent on the questions presented to me here which I consider primarily question of fact."

testified approximately four days and his testimony aggregates some 524 written pages. In judging of the credibility of the witnesses the trial court said (R. 4248-9):

> "I want to say another general thing about the credibility of the witnesses. Part of the responsibility of a trier of the fact in weighing the credibility of witnesses is to look at them and to listen to them to try to evaluate the kind of people they are, and to gain some impression from the way they testify and from their appearance and demeanor as to what kind of people they are, how credible they are, and what weight and value should be given to their testimony. Sometimes it happens, gentlemen, that the very forensic defects and inadequacies of a witness will speak more forcefully of his credibility and the meaning of the words he uses than if he were more glib, more positive and certain about the matters concerning which he gives testimony. I have seen the thing happen with juries time and again. It happens, certainly, with me as an individual. It has happened in this particular case. The very inadequacies of Mr. O'Donnell, as a witness, somehow or other have brought to me a conviction as to his integrity and credibility that might be difficult to understand simply from a reading of the cold record of exactly what he said.
>
> "I cannot subscribe to the castigation of Mr. O'Donnell's character and of his testimony that counsel for the plaintiff have given in their briefs and argument, although I am far from resentful of their [making it].[30] It is their duty to make that

[30]Words within brackets supplied from stenographic transcript of District Court's proceedings.

> contention [if they sincerely] believe the record supports it. I [haven't any doubt] of the professional integrity of plaintiff's counsel; I just [can't] agree with their view, and I don't [agree] with it. *I must say that Mr. O'Donnell impressed me most favorably.*" (Emphasis supplied)

In essence the trial court accepted O'Donnell's version of the facts and rejected Joseph's.[31] The trial court found (R. 4258-9):

> ". . . Under the evidence which to me seems credible, the relationship between these parties at best is so vague, indefinite, and speculative, that as the trier of fact I cannot find assent and agreement on minimum elements amounting to a legally enforceable contract."

Where, as here, the parties' intentions and factual inferences are found from conflicting testimony, the court's findings with respect to each are findings of fact pure and simple and appellant's long and involved argument cannot make them otherwise. *United States v. Yellow Cab Company,* 1949, 338 U.S. 338, 70 S.Ct. 177, 94 L.ed. 150; *United States v. Oregon State Medical Society,* 1952, 343 U.S. 326, 72 S.Ct. 690, 96 L.ed. 978; *Quon v. Niagara Fire Ins. Co. of New York,* 9 Cir. 1951, 190 F.2d 257; *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.,* 9 Cir. 1949, 178 F.2d 541; *Grace*

---

[31]Cf. Jerome Frank, J., in *Broadcast Music, Inc. v. Havana Madrid Restaurant Corporation,* 2 Cir. 1949, 175 F.2d 77, 81, n. 12:

"Judges are usually reluctant to call a witness a liar. See Moore, Facts (1908) § 1048-1050. They prefer more polite locutions, such as saying his testimony was 'latitudinous'; see Mr. Justice Baldwin in Poole v. Nixon, 19 Fed. Cas. 992, at p. 996, No. 11,270.

"Moreover, as may well have been the case here, the judge may think the witness did not commit perjury but was honestly mistaken, because of bias or for other reasons."

Bros. Inc. v. Commissioner of Internal Revenue, 9 Cir. 1949, 173 F.2d 170; *Weyl-Zuckerman & Co. v. Comm'r. of Internal Revenue,* 9 Cir. 1956, 232 F.2d 214.

It follows that since the court's findings epitomized above are supported by competent, credible evidence they are binding upon this court, under Rule 52(a), Federal Rules of Civil Procedure reading as follows:

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial judge to judge of the credibility of the witnesses."

A presumption of correctness attaches to the findings of the trial court, and where, as here, the findings are based on the trial court's evaluation of conflicting evidence, this court will not substitute its own evaluation thereof for that of the trial court. *United States v. Yellow Cab Company,* 1949, 338 U.S. 338, 70 S.Ct. 177, 94 L.ed. 150; *United States v. Oregon State Medical Society,* 1952, 343 U.S. 326, 72 S.Ct. 690, 96 L.ed. 978; *Quon v. Niagara Fire Ins. Co. of New York,* 9 Cir. 1951, 190 F.2d 257; *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.,* 9 Cir. 1949, 178 F.2d 541; *Hunt Foods, Inc. v. Phillips,* 9 Cir. 1957, 248 F.2d 23, 31; *Ruud v. American Packing & Provision Co.,* 9 Cir. 1949, 177 F.2d 538; *Russell v. Texas Company,* 9 Cir. 1956, 238 F.2d 636; *Continental Casualty Co. v. Schaefer,* 9 Cir. 1949, 173 F.2d 5, 8; *Puget Sound Pulp & Timber Co. v. O'Reilly,* 9 Cir. 1956, 239 F.2d 607.

In *Fegles Const. Co. v. McLaughlin Const. Co.,* 9 Cir. 1953, 205 F.2d 637, 639, this court said:

> ". . . when a finding is attacked as being unsupported, the power of the appellate court *begins and*

> *ends* with a determination as to whether, *considering the whole record,* there is substantial evidence which supports the conclusion reached by the trier of fact." (Emphasis supplied)

And, the circuit court should not disturb the findings of the district court even though it might have reached a contrary decision had it determined the facts in the first instance. In *Puget Sound Pulp & Timber Co. v. O'Reilly,* 9 Cir. 1956, 239 F.2d 607, 609, this court said:

> ". . . regardless of *what decision* this court might reach, were it considering the evidence in the first instance, *it may not disturb the trial court's finding unless it is clearly erroneous.*" (Emphasis supplied)

C. This Court Should Not Reconsider the Case De Novo

Shorn of invective and subtleties, appellant's opening brief, it seems to us, is nothing more nor less than an argument that this court, contrary to its own decisions and the clear mandate of Rule 52(a), should *reconsider* this case *de novo, re-evaluate* the sharply conflicting evidence and *substitute* its judgment for that of the able and competent trial judge who decided the case. Specifically, appellant asks this court:

1. To *reject* the trial court's finding that no agreement, express or implied, existed between Joseph and O'Donnell;

2. To *substitute* a finding that an agreement did exist between them;

3. To *interpolate* in the agreement so found the terms and conditions thereof, including the specific obligations owed by each to the other;

4. To *find additionally* that the agreement so found contains all of the *factual* bases for a valid *contract* under Oregon law;

5. To *find additionally* that Joseph had honored and performed the duties owing to O'Donnell under the terms *interpolated* in such contract;

6. To *find additionally* that O'Donnell had breached specific obligations owing to Joseph under the terms *interpolated* in such agreement;

7. To *reject* the trial court's finding that if any relationship existed between Joseph and O'Donnell it was terminated;

8. To *substitute* its own finding that such relationship continued in effect;

9. To *reject* the trial court's finding that Joseph speculatively delayed bringing this action; and

10. To *substitute* its own finding that the action was timely brought.

Thus, appellant's counsel urges this court to *re-try* the case *de novo,* to completely *re-evaluate* the evidence and to *reject, substitute* and *add* findings "almost entirely concerned with imponderables" such as the intentions, designs and motives of Joseph and O'Donnell with respect to acts and occurrences which took place some three or more years before the trial in the court below, notwithstanding that the facts were found by the trial court after it had weighed the evidence and judged of the credibility of the witnesses.

This very same argument has been rejected both by the Supreme Court of the United States and by this

court. *United States v. Yellow Cab Co.,* U.S. 1949, 338 U.S. 338, 339, 340; *United States v. Oregon Medical Society,* U.S. 1952, 343 U.S. 326, 331; *Ruud v. American Packing & Provision Co.,* 9 Cir. 1949, 177 F.2d 538; *Russell v. Texas Company,* 9 Cir. 1956, 238 F.2d 636.

In *United States v. Yellow Cab Co.,* U.S. 1949, 338 U.S. 338, 340-341, the United States Supreme Court speaking through Mr. Justice Jackson said:

> "What the Government asks, in effect, is that we try the case *de novo* on the record, reject nearly all of the findings of the trial court, and substitute contrary findings of our own. Specifications of error which are fundamental to its case ask us to reweigh the evidence and review findings that are almost entirely concerned with imponderables, such as the intent of parties to certain 1929 business transactions. . . .
>
> "These were the chief fact issues in a trial of three weeks' duration. The Government relied in large part on inferences from its 485 exhibits, introduced by nine witnesses. The defendants relied heavily on oral testimony to contradict those inferences. The record is before us in 1,674 closely-printed pages.
>
> "The Government suggests that the opinion of the trial court 'seems to reflect uncritical acceptance of defendants' evidence and of defendants' views as to the facts to be given consideration in passing upon the legal issues before the court.' We see that it did indeed accept defendants' evidence and sustained defendants' view of the facts. But we are unable to discover the slightest justification for the accusation that it did so 'uncritically.' Also, it rejected the inferences the Gov-

ernment drew from its documents, but we find no justification for the statement that it 'ignored' them. The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, . . .

. . . . .

"Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends." (Emphasis supplied)

In *United States v. Oregon State Medical Society,* 1952, 343 U.S. 326, 331-332, the Supreme Court of the United States, again speaking through Mr. Justice Jackson, said:

"The Government asks us to overrule each of these findings as contrary to the evidence, . . . We are asked in substance to try the case de novo on the record, make findings and determine the nature and form of relief. We have heretofore declined to give such scope to our review. United States v. Yellow Cab Co. (U.S.) supra. . . .

". . . There is no case more appropriate for adherence to this rule [52(a)] *than one in which the complaining party creates a vast record of cumulative*

evidence as to long-past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses.'' (Emphasis supplied)

This court also refuses to retry a case de novo. In *Ruud v. American Packing & Provision Co.,* 9 Cir. 1949, 177 F.2d 538, this court said at page 540:

'' . . . Manifestly, if the findings of the court are sustained by substantial competent evidence the judgment appealed from should be affirmed. These findings are presumptively correct and must be sustained unless clearly erroneous. [Citing authorities.] *Defendant's argument is presented on the apparent theory that the action is triable de novo in this court but this is an appellate court and our function is to review alleged errors of law that may have been committed by the trial court. We are not at liberty to substitute our judgment for that of the trial court, and on appeal that view of the evidence must be taken which is most favorable to the prevailing party, and, if when so viewed, the findings are supported by substantial competent evidence, they should be sustained.''* (Emphasis supplied)

In *Russell v. Texas Company,* 9 Cir. 1956, 238 F.2d 636, this court said at page 644:

''. . . No duty, *in fact no authority,* rests with us to review a trial court's decision based on its view of the evidence unless a plain error of fact appears or there is a misapplication of a rule of law, [Citing cases.] Where the result is rational and reasonable, the acceptance or rejection of testimony by a trial judge is binding upon this Court, and what is thus done by the trial judge must not be disturbed by us, . . .'' (Emphasis supplied)

IV.

The So-Called "Admissions" and "Undenied Evidence," Being at Most Oral Testimony, Largely of Interested Witnesses, Was Subject to Evaluation or Rejection by the Trial Court

We have heretofore pointed out that the court's findings are fact findings pure and simple. Appendix II, documented to the record itself, conclusively demonstrates that those findings are supported by substantial competent and credible evidence.

To induce this Court to ignore the trial court's findings and substitute its own, appellant's counsel fabricate a wholly false and specious argument. Under Heading II on page 19 of their opening brief, counsel state: "To the Extent That, as Here, the Challenged Findings Are Necessarily Based Upon Matters as to Which There Are Admissions by Defendants and Undisputed Matters and Documentary Evidence or Such Findings Are Conclusionary in Character, the Reviewing Court Does Not Give Great Weight to the Findings of the Trial Court." Heading (a) appearing on page 9 of their opening brief states: "Admissions and Undenied and Documentary Evidence Establish This Case." Since we discuss each of the so-called "admissions" and claimed "undenied evidence" in detail on pages 85 to 95 of this brief, and the documents which appellant seems to consider important on pages 95 to 119, we shall not comment again upon them in detail at this point.

But it is simply not true that a joint venture agreement is established between Joseph and O'Donnell by documentary evidence; for although several hundred

exhibits were introduced in evidence, none of them refer in any way to any agreement between Joseph and O'Donnell.[32] Such documentary evidence as is competent at all is concerned solely with collateral facts, and bears only indirectly, if at all, upon the existence or non-existence of an agreement between Joseph and O'Donnell. Cf. *Quon v. Niagara Fire Ins. Co. of New York,* 9 Cir. 1951, 190 F.2d 257, 260.

Under the heading "Admissions and Undenied and Documentary Evidence Establish This Case," appellant's counsel falsely characterize some twelve or more items as "admissions" and two items as "undenied evidence."[33] On page 9 of appellant's opening brief, counsel say, "Plaintiff urges that the admissions of defendants alone virtually require judgment for plaintiff as an equal joint venturer in the purchase of a vast lumber company . . . " Counsel then falsely assume that the so-called "admissions" and "undenied evidence" are *undisputed* facts. After making such false *assumption,* they erroneously conclude that the trial court's findings are "conclusionary in character" and that the findings and all testimony contradicting the so-called "admissions" and "undenied evidence" may be ignored by this court under the following language of the leading case of *Orvis v. Higgins,* 2 Cir. 1950, 180 F.2d 537, 539:

> "(b) Where the evidence is partly oral and the balance is written or deals with undisputed facts,

[32]An exception is Exhibit 117, a letter written to O'Donnell by Joseph's counsel, in the nature of a demand as a foundation to bringing this action, *20 months after Kinzua* had been purchased by appellees.

[33]Each of these is the subject of particular comment in the section of the brief commencing at page 84.

> then we may ignore the trial judge's finding and substitute our own, (1) *if* the written evidence or some *undisputed fact* renders the credibility of the oral testimony extremely doubtful, or (2) *if* the trial judge's finding must rest *exclusively* on the written evidence or the undisputed facts, *so that his evaluation of credibility has no significance.*" (Emphasis supplied)

By such artifice does appellant's counsel seek to beguile this court to ignore the findings of fact the trial court found after *weighing* conflicting testimony and *judging* of the credibility of the witnesses.

Their argument is false from every standpoint.

The so-called "admissions" and "undenied evidence" *are not undisputed facts* controlling the disposition of the case *so that the trial judge's evaluation of credibility has no significance,* (the only basis upon which this court may ignore the findings of the trial court under the doctrine of *Orvis v. Higgins, supra*). Except for a very few agreed and insignificant items, themselves consistent with the *non-existence* of a joint venture agreement, *they are not facts at all.* Nor are they undisputed and undenied. Many of the so-called "admissions" and "undenied evidence" are at most misstatements and distortions of fragments of O'Donnell's and Joseph's *oral* testimony, snatched completely out of context, and upon which the trial court placed contrary evaluations. Others of them have no basis in fact at all.

Illustrative is counsel's assertion on page 10 of appellant's opening brief, that Joseph testified, without denial by Chinn and O'Donnell, that at the time of their

Portland visit on November 18, Joseph and O'Donnell agreed that Joseph and his group would take a 50% interest and O'Donnell and his group would take a 50% interest in Kinzua. That assertion is entirely false. As we show in detail elsewhere (pages 152 to 163 hereof), it is not even a statement of Joseph's own testimony; but Joseph's testimony, itself, was categorically and emphatically denied by both Chinn and O'Donnell (O'Donnell, R. 1647-50, 1652-5; Chinn, R. 905, 994, 1001-3).

Moreover, Joseph's testimony is entirely inconsistent with his own actions and statements during the Portland meetings on November 18 and 19, and subsequently. For example, when counsel's so-called "agreement" was supposed to have been created, Joseph did not know Kinzua's sale price and he knew little about Kinzua itself (Joseph, R. 374-5; *cf.*, Opinion, R. 4256; Finding V(1), R. 250). Immediately before going into the meeting with Kinzua's representatives on November 19, O'Donnell asked Joseph, "What is the dope, Harry?" and Joseph replied, "We will go upstairs and see Mr. Coleman *and find out*" (O'Donnell, R. 1625). When the sales price was announced by Kinzua's representatives, Joseph was genuinely surprised at the size of the sale price, and he stated that at most, he would be "a small minnow in this sea, this big sea" (O'Donnell, R. 1638, 1640-1, 1654). Following the meeting with Kinzua's representatives, he protested that the asking price for Kinzua was "outrageous" and unreasonable (O'Donnell, R. 1643; Chinn, R. 921). But after O'Donnell replied that if Kinzua had the timber and assets represented by Kinzua's sales representatives, the price

might not be unreasonable (O'Donnell, R. 1643; Chinn, R. 921; Joseph, R. 381), Joseph said that "maybe some of the boys who had some tax money could get together and put up $600,000 and the deal could be sold to someone else" (O'Donnell, R. 1644-5; Chinn, R. 924-5). When O'Donnell replied he was a sawmill operator and was not interested in peddling sawmills, Joseph said "some of the boys around Chicago, friends of mine around Chicago, might be interested in a deal of this kind, and if they are, I will let you know" (O'Donnell, R. 1645). Joseph, however, did not then or at any time subsequently, give O'Donnell the names of any persons who might be interested in such a deal; nor did he indicate the amounts they might contribute individually or collectively (O'Donnell, R. 1646, 1948; Joseph, R. 555-6). And as a matter of fact, Joseph himself never told O'Donnell at any time that he would invest in Kinzua (O'Donnell, R. 1948; Joseph, R. 555-6).

Despite the foregoing, appellant's counsel claim that because Chinn and O'Donnell testified they could not remember insignificant details of their November 18th visit with Joseph prior to the meeting with Kinzua's representatives the next day, they were not in any position to deny Joseph's version of what occurred. Accordingly, they argue, Joseph's testimony stands undenied and was conclusive upon the trial court.

It is ludicrous to believe that any responsible business man would forget having agreed to supply one-half the purchase price for the acquisition of a multi-million dollar property if he had actually done so. It should be too obvious to require argument that exact placing with

respect to time and location of the significant parts of an 18 hour period of conversation, visit and sleep is not the test of whose version of the crucial elements of a conversation or conversations is the correct one in spite of all else. It is clearly insignificant whether in fact the significant portions of the conversation took place on the way up to the University Club, at the bar in the University Club, at dinner, at the night club, in the hotel lobby or elsewhere, or whether it was at midnight one day or at noon the next. Except to the extent that such time and place bears on the credibleness of the story itself, it is in fact wholly immaterial. Joseph says the crucial conversation took place before the meeting with selling agents at a time when neither Joseph nor O'Donnell knew what in fact was for sale or the price thereof.[34] O'Donnell says any significant conversation took place either during the meeting with selling agents or immediately thereafter at a time when they had at least found out the selling price, the terms and the barest outline of what was for sale. O'Donnell's time sequence is much more probable than that of Joseph—then at least the parties to the conversation had some idea of what they were talking about.

In this situation, the trial court was forced to and did weigh the evidence and judge of the credibility of Joseph, Chinn and O'Donnell (Trial Court's Memorandum Decision, R. 4254-57; Finding of Fact V(1), R. 250). And it is for this very reason that this Court

[34]Joseph did not so state on all occasions. In his letter dated June 23, 1954, to Lee Olwell (Exhibit 97), Terman's Seattle attorney, Joseph places the dinner at the University Club, and his alleged conversation with O'Donnell after the meeting with the sellers' agents, Coleman and Casey.

will not substitute findings of its own. As pointed out by Judge Jerome Frank in *Orvis v. Higgins,* 2 Cir. 1950, 180 F.2d 537, 539-40, one of the principal cases upon which appellant's counsel rely:

> "But where the evidence supporting his [the trial judge's] finding as to any fact issue is entirely oral testimony, we may disturb that finding only in the most unusual circumstances."

That is precisely the situation here.

In any event, as a matter of law, it simply is not true that the trier of the fact is bound to find in accordance with the statement of an interested party even if uncontradicted. This is the precise holding of this court in *Quon v. Niagara Fire Ins. Co. of New York,* 9 Cir. 1951, 190 F.2d 257, and of the Second Circuit in *Broadcast Music, Inc., v. Havana Madrid Restaurant Corporation,* 2 Cir. 1949, 175 F.2d 77, 79. In the *Quon* case, this court said (at p. 259):

> "The argument of appellant is that the testimony of Quon, as to the details relied upon for estoppel, was uncontradicted. Therefore it is said this evidence must be accepted as conclusive. But the trial judge was entitled to consider other circumstances such as the facts at the time the case eventually came on for trial. After the time limited had expired, two witnesses were dead, and one very important witness had disappeared. The plaintiff was, of course, a highly interested party.
>
> "In any event, *it is not true that the trier of the fact is bound to find in accordance with the statement of one witness or any number of witnesses which do not satisfy his mind.* This is a stock instruction to juries. The burden of proof was on appellant. *If the testimony produced lacked credibil-*

ity, it was not proof even if uncontradicted. The problem of proof cannot be resolved scientifically by quantitative analysis, as some have suggested. *The trial judge was the arbiter.* While the testimony of Quon and his witness, if believed, might have been sufficient to establish estoppel, a point which we do not decide, the findings clearly show they were not believed." (Emphasis supplied)

In this case, it is obvious the trial court did not believe Joseph.

In *Broadcast Music, Inc., v. Havana Madrid Restaurant Corporation,* 2 Cir. 1949, 175 F.2d 77, 79-81, Judge Jerome Frank said:

"Plaintiffs contend that, as the testimony of the witness Castro was uncontradicted, unimpeached by anything appearing in the record, and not inherently improbable, the trial judge was obliged to accept it as true, and that therefore the judge's findings are 'clearly erroneous.' We cannot agree.

"Whether the so-called 'uncontradicted testimony' rule has been adopted by the Supreme Court we are not at all sure. . . . The rule, absent . . . qualifications, has been rejected in several states, and has little to commend it rationally. For the demeanor of an orally-testifying witness is 'always assumed to be in evidence.' It is 'wordless language.' The liar's story may seem uncontradicted to one who merely reads it, yet it may be 'contradicted' in the trial court by his manner, his intonations, his grimaces, his gestures, and the like—all matters which 'cold print does not preserve' and which constitute 'lost evidence' so far as an upper court is concerned. . . . A 'stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a

sentence mean the reverse of what the words signify. . . . The witness' demeanor, not apparent in the record, may alone have 'impeached' him. . . .

. . . . .

"We shall, however, assume, arguendo, that the rule prevails in the federal courts. Even so, it will not avail plaintiffs. For among the exceptions to the rule is this: *It is inapposite if the witness has an 'interest.' . . . As Castro's testimony had no corroboration, this case comes within the 'interest' exception to the rule. We may not, then, disregard the trial judge's finding of fact based obviously on his disbelief of the testimony on which plaintiffs rely.*" (Emphasis supplied)

Counsel's so-called "admissions" and "undenied evidence" are entitled to no special sanction because they are so characterized. Certainly the unsupported statements of counsel are entitled to no consideration at all. Nor was the trial court bound by counsel's interpretation and construction of the so-called "admissions" and "undenied evidence." It was the trial court's bounden duty to place *its own* evaluation upon such evidence *after* viewing it in its proper "setting together with all the other evidence in light of the credibility accorded the witness[es]." *Quon v. Niagara Fire Ins. Co. of New York,* 9 Cir. 1951, 190 F.2d 257, 260. And this is true with respect to so-called documentary evidence as well as oral testimony. Thus in the *Quon* case, this Court said (at p. 260):

"It is urged with great force that the solution of this cause depends upon a letter written by Quigg to Quon's attorney soon after the first investigation, and that this Court must interpret this

writing irrespective of the finding of the Trial Court. . . .

" . . . here the question was one of waiver or of estoppel, which involves among other factors the intention of the party. The writing under these circumstances must be viewed in its setting together with all the other evidence in light of the credibility accorded the witness. Here the writing is one of the collateral facts. . . . Here the Trial Court held that there was neither waiver nor estoppel, that there were no misrepresentations, and that Quon was not misled.

"Under such circumstances, the use of the cliché that the appellate court is in as good a position as the trial judge to construe a writing is futile. The maxim is not true, as often happens with stereotyped sayings, in this situation. *Here the construction entered into a finding of fact which cannot be set aside unless clearly erroneous.* . . .

"The theory that there is some magic in the writing itself and that the construction of writings by an appellate court has some special sanction is applied not only in cases such as this, but to depositions, incidental documents, stipulations before the trial court and other features. None of this is valid. *The problem before the court is generally one of fact, and there the findings of the trial court are binding.* There are many cases where the construction of writings is a question of law. *But here the interpretation of this document was required in connection with many circumstances as a question of fact.* There was substantial evidence to support the findings, and these are not clearly erroneous. No rule of law was violated." (Emphasis supplied)

Here the problem before the trial court was whether

or not *as a matter of fact* Joseph and O'Donnell intended to and did enter into a joint venture agreement, express or implied in fact. The issues involved were fact issues pure and simple. Viewing the entire evidence, as the trial judge said, from stem to stern, he found the facts adversely to appellant's claim. As in *Quon* appellant may not now fabricate a legal issue out of these purely factual matters. The trial court's findings are not only supported by substantial competent evidence; they are correct. No rule of law was violated. The trial court's findings should not be disturbed.

V.

The Keystone to Appellant's Case Missing—No Agreement of Joint Venture by Express Words or Implication Arising by Conduct

As the trial court in its oral opinion so aptly stated:

> "The burden rests upon the plaintiff in the first instance to establish the existence of the joint purchase agreement as an element of a contract of joint venture. . . . Such a contract could only be established by either *express words* to that effect or by *implication arising* from the conduct of the parties or by a combination of both. There is no other possible way that it could arise, that basic contractual relationship between them." (R. 4253-4; Emphasis supplied)

Joseph's claim is based upon his counsel's assumption that an *express oral contract of joint venture was entered into between him and O'Donnell on November 18, 1952, at Portland, Oregon.* On page 12 of appellant's opening brief counsel say:

> "They [Joseph and O'Donnell] agreed specifi-

> cally and affirmatively that Joseph and O'Donnell, for themselves and groups headed by each of them in Chicago and Seattle respectively, should, as equal joint venturers negotiate for and consummate the purchase of Kinzua on whatever suitable purchase basis could be arranged."

This is the very keystone of appellant's case for even his counsel do not argue that the acts of the parties independently of the existence of the claimed express contract established a contract of joint venture. They go no further than to argue that the subsequent acts of Joseph and O'Donnell are consistent with its existence.

A. No Express Words of Contract

The claim of Joseph's counsel that a contract of joint venture was created by express agreement is without support in fact. The trial court's finding as stated in his opinion that

> "I cannot find that any such words [express words of contract] were spoken by Joseph or, if so, that they were understood and assented to by O'Donnell." (R. 4254),

is fully supported by the record and the evidence.

The events leading up to the November 18 and 19, 1952 Portland visit of Joseph, O'Donnell and Chinn is covered in the trial court's Finding of Fact No. IV; and the Portland visit itself, including the meeting of November 19th with sellers' agents Coleman and Casey, is covered in Finding No. V.

Summarized, the following are the significant events which occurred during the entire Portland visit of November 18th and 19th, based upon the testimony of O'Donnell (whom the Trial Court said "impressed me

most favorably," R. 4249), and backed up by the testimony of Chinn (whom the trial court observed was very frank, R. 811):

1. Prior to their talk with the sellers' agents, O'Donnell and Joseph knew little about Kinzua other than that it was for sale (Chinn, R. 907-10; Joseph, R. 374-5; Terman, R. 1152-4, 1222-4; Needleman, R. 2764).
2. *The only significant reference to a possible purchase of Kinzua prior to the meeting with the sellers' agents Coleman and Casey the morning of November 19th was Joseph's comment to the effect of "Let's talk to Coleman and find out what this is all about"* (O'Donnell, R. 1625).
3. During the meeting with the sellers' agents, Coleman and Casey advised that the purchase price asked was twelve million dollars, payable $4,800,000 down and the balance in annual installments of $900,000 with interest at 4½% (O'Donnell, R. 1632, 1634; Chinn, R. 914); *that they would not negotiate with prospective purchasers until satisfied such prospective purchasers* were acting as principals, were persons of integrity and responsibility, and had sufficient operating capabilities and financial resources to purchase and operate the Kinzua properties (O'Donnell, R. 1634); and, further, that they would not permit an inspection or investigation of Kinzua properties and financial affairs without the prior deposit by the prospective purchasers of $600,000 in cash, the $600,000 to be returned if the holdings and financial statement were not as represented; otherwise, the $600,000 to apply on the purchase price or be forfeited if the purchase was not completed (O'Donnell, R. 1632; Chinn, R. 915). The assets concerned were out-

lined in a very general way, including the statement that there was at least 500,000,000 feet of timber involved (O'Donnell, R. 1632-3; Chinn, R. 914-5).

4. *The only reference made by Joseph, O'Donnell or Chinn that could be construed as indicating his (Joseph's) interest in a participation in a possible purchase of Kinzua was the statement made by Joseph during the meeting with Coleman and Casey when, upon hearing of the twelve million-dollar asking price, he indicated surprise at the amount and said, "Well, I would be a small minnow in such a big sea," or words to that effect* (O'Donnell, R. 1654, 1638, 1640).

5. In the few minutes that O'Donnell and Chinn were with Joseph immediately following the meeting with sellers' agents, Joseph protested the price asked was unreasonable (O'Donnell, R. 1643-4; Chinn, R. 921), and O'Donnell stated if they had the assets they outlined the price might be all right (O'Donnell, R. 1643-4; Chinn, R. 921). *Joseph then suggested that maybe some of the boys who had some tax money could get together and put up the $600,000 (required for inspection) and the deal could be sold to someone else* (O'Donnell, R. 1644-5; Chinn, R. 924-5). *O'Donnell said he was a sawmill operator and was "not interested in peddling sawmills"* (O'Donnell, R. 1644-5; Chinn, R. 924-5). *Whereupon, Joseph said:*

> *"Well, some of the boys around Chicago, friends of mine around Chicago, might be interested in a deal of this kind, and if they are, I will let you know."*

He did not state or indicate who they might be, nor the amounts they might invest (O'Donnell, R. 1645-6; Joseph, R. 556).

6. O'Donnell inquired of Joseph what Terman's interest in Kinzua might be and Joseph replied, "Oh, don't worry about him. He is a friend of a lawyer down there who is the attorney for one of the big stockholders, a widow, or a woman in California" (O'Donnell, R. 1646-7; Chinn, R. 921-4).

7. When O'Donnell and Joseph parted in Portland, there was no understanding about what would be done in the future other than that Joseph indicated he would let O'Donnell know if any of his Chicago acquaintances became interested (O'Donnell, R. 1643-55; Chinn, R. 927-8).

The foregoing fully supports the trial court's findings that:

(1) "I am completely satisfied that there were no express words of agreement passing between Joseph and O'Donnell which would amount in law to a contract. I cannot find that any such words were spoken by Joseph or, if so, that they were understood and assented to by O'Donnell." (R. 4254)

(2) "This is just one of the many circumstances in the evidence that has led me to the firm conclusion that there were no express words of mutual understanding and assent sufficient to amount to contract between Joseph and O'Donnell." (R. 4255-6)

B. No Contract by Implication Arising from Conduct or Combination of Words and Conduct

As noted in the preceding section, the keystone to appellant's case is the *assumption* of an express agreement reached at the Portland meeting between Joseph and O'Donnell. There was, in fact, no such agreement; therefore, appellant's case should fall at that early point.

However, the trial court went further in his oral opinion and Findings of Fact. He posed the question, "Was there any course of conduct between these men that gave rise to the implication that they had a legally binding contract for a joint purchase of Kinzua?" (R. 4257), and found that there was none, stating:

> ". . . I have looked the evidence over from stem to stern and *I can't find it.* Of course, if you start with the assumption that they had an express agreement to that effect in the first place, then you can find support for the assumption in isolated parts of the conduct afterward; but if you don't start with the assumption, you can't find a contract in the course of the conduct of the parties." (R. 4257)

> ". . . *The evidence is wholly insufficient to establish a contract arising by implication from the conduct of the parties.*" (R. 4258)

> " . . . Under the evidence which to me seems credible, the relationship between these parties at best is so vague, indefinite, and speculative, that as *the trier of fact I cannot* find assent and agreement on minimum elements amounting to a legally enforceable contract." (R. 4258-9; Emphasis supplied)

Of course, a reading of most, if not all, of the testimony would be required to encompass the evidence considered by the trial judge. Even then, it would not be with the inevitable advantage of observing and hearing the witnesses. Keeping in mind that this brief would be extended beyond manageable limits if we discussed even generally all of the matters which were observed and considered by the trial court in concluding that Joseph's claim of joint venture is *"incredible and untenable"* (R. 4261), we now discuss and point up some

of the aspects of the evidence which, along with others, made the trial court's Findings and Conclusions inevitable.

1. The relationship of Joseph and Terman

a. *Terman had a direct interest in Joseph's suit*

Since Terman is often mentioned in this brief and he is the subject of much of the testimony and a large part of all of the exhibits are his handwritten memos, Terman's relationship to Joseph and to the Kinzua purchase is brought into focus at this point. Terman was far from being a disinterested witness. He had a very direct interest in Joseph's lawsuit.

Terman was a real estate agent in Beverly Hills, California, and was totally unfamiliar with logging and lumber manufacturing. He had once resided in Chicago where he had been a long-time social acquaintance of Joseph and knew that he operated a retail lumber yard in Chicago (Terman, R. 1146-7).

Needleman and Gold were law partners in Beverly Hills, California, and attorneys for Gladys Anderson Zurlo, a 49% stockholder of Kinzua (Admitted Fact IX, R. 156; Needleman, R. 2693, 2696-8; Gold, R. 2935). They were also both directors and members of the executive committee of Kinzua (Admitted Fact IX, R. 156; Needleman, R. 2693, 2696-8; Gold, R. 2935; Exhibit 653). Neither, however, was an authorized selling agent (Needleman, R. 2703, 2706).

Needleman, sometime in the early spring of 1952 or at least prior to October of 1952, advised his intimate social acquaintance Terman (a former tenant of the law

firm's offices) (Terman, R. 1281), that Kinzua was for sale but gave him no details (Terman, R. 1148, 1222-3; Needleman, R. 2713-4, 2764).

Needleman further advised Terman that Coleman (who was a selling agent) only wanted Needleman to refer prospects and not to discuss the details and that Coleman would deal only with principals and Terman would have to act as or for a principal (Terman, R. 1153; Needleman, R. 2727-9; Exhibits 502, 541). Terman could think of only one person in the lumber business who could front as a principal—Joseph (Terman, R. 1153-4). Needleman then wrote to Coleman about Terman (Exhibit 541) and drafted a letter for Terman to send to Coleman in which Terman advised Coleman he had no interest "except with Mr. Joseph and his associates." (Exhibits 502, 540). Terman asked Coleman to advise him where they could discuss the matter (Exhibit 502), but Coleman never responded (Terman, R. 1169).

Terman's notes during this period contain the following statements:

> ". . . Jim Needleman, atty. [attorney] for some of stockholders—who is guiding me . . . Has to be on direct basis which I am acting as for the moment —Fee not paid by seller. So arrange purchase price to allow 250 M for fee and costs" (Exhibits 328, 330);
>
> "I advised Joseph that I am acting as his associate in this deal as Coleman prefers not to deal with brokers—Also told Joseph to allow 5% fee for me in event deal is made which he agreed to." (Exhibit 335)

Terman in his voluminous memo exhibits also makes reference to his commission at least ~~eight~~ TWELVE other times.

While Chinn and O'Donnell were in Los Angeles on November 6, 1952, on their separate, unrelated businesses, Terman visited them at their hotel. Kinzua was discussed but Terman did not convey to them any information which was not already known by them (O'Donnell, R. 1605-8; Chinn, R. 872-3). This was the only occasion upon which O'Donnell ever met or talked to Terman. Terman, realizing that in O'Donnell as a principal there might be an entré to Coleman, informed Gold of the visit of Chinn and O'Donnell (Exhibit 340). Gold thereafter called Coleman who then called Joseph (Exhibit 342) and arranged with Joseph for the Portland meeting with Joseph and O'Donnell on Joseph's way to his annual winter vacation in California (Exhibits 344, 345). Joseph reported this to Terman who reported it to Gold (Exhibits 344, 345).

As O'Donnell was about to leave Portland on November 19, 1952, he inquired about Terman, and Joseph replied:

> "Oh, don't worry about him. He is a friend of a lawyer down there who is the attorney for one of the big stockholders, a widow, or a woman in California . . . A friend of mine, a friend of one of the lawyers who represents one of the big interests." (O'Donnell, R. 1646-7; Chinn, R. 921-2)

Thereafter, Terman's notes reflect, and Needleman's and Gold's notes confirm, what Terman states in his letter to Joseph of August 30, 1953, " . . . Everytime you [Joseph] and I [Terman] had telephone or letter communication, I would immediately advise Needleman

or Gold of the facts . . . " (Exhibit 89). A conduit existed where Joseph relayed all information he got from O'Donnell to Terman, and Terman relayed it to Needleman or Gold, the attorney for the largest stockholder of Kinzua! That Joseph did not advise O'Donnell of this, however, is apparent from Exhibit 43, the transcript of a December 23, 1952, phone conversation between Gold and Casey, one of the selling agents. Certainly O'Donnell, out of good taste alone, would not have told Coleman at the time he advised him on December 19th that he was not going to proceed with Kinzua, that the timber looked buggy, short-bodied and black-knotted — but the information got there through the conduit.

Every step Joseph took appears from Terman's notes to have been at the push of Terman. However, after Joseph on December 30, 1952, advised A. C. Allyn (the head of a large investment firm in Chicago) (Joseph, R. 447-9; Allyn, R. 2871) that Kinzua was available for purchase (at which time Allyn thought Joseph was seeking a finder's fee) (Allyn, R. 2879), and from January 10, 1953, the date of Terman's memo (Exhibit 396) making reference to Allyn and that O'Donnell might still be interested, Terman (if his and Joseph's testimony and notes are to be believed) did not "push" or "jog" Joseph again nor inquire of Needleman or Gold about Kinzua in any way until after Kinzua's purchase (Joseph, R. 650-1).

Likewise, Joseph, freed from prodding by Terman, thereafter seemed to forget the matter, except for unsuccessful attempts to talk with Allyn during Febru-

ary and early March, so that he could report to Terman that he hadn't forgotten him (Exhibits 55 and 116). Even this interest disappeared completely insofar as the record and testimony indicates, in spite of the fact that Joseph was advised by O'Donnell in late February that Joe Coleman's brother had called him in Palm Springs, and that O'Donnell was going to meet with Joe Coleman (Exhibit 116). Nor did O'Donnell's telephone call on March 31, 1953, telling Joseph of Price's favorable report and that he (O'Donnell) was going to go ahead and look the Kinzua deal over (O'Donnell, R. 1840-1, 1947-8), or Allyn's telephone call to Joseph at the end of April, 1953, advising that Allyn was dropping Kinzua (Allyn, R. 2875-6), revive any interest or inquiry from Joseph or Terman (Joseph, R. 644, 634-6, 495-7; Terman, R. 1386).

Not until the end of August did either Terman or Joseph indicate any interest in Kinzua. On August 27, 1953, Joseph, learning of Kinzua's purchase by the appellees, wrote to Terman and suggested that Terman's friend Needleman, the conduit to the sellers, "should have said something to you about this" (Exhibit 87). Terman replied that he had asked Needleman for an explanation (Exhibit 89).[35]

After reading O'Donnell's letter of September 22, 1953, to Joseph about the sale (Exhibit 93), Terman

[35] In an early memo of Terman's dated December 16, 1952, Terman reported that Needleman "said he would see that I was protected on commission as no deal would be made unless he knew about it and would see to it that I was protected on the commission" (Exhibit 379). Needleman denies this statement (Needleman, R. 2790). Needleman and Gold both knew in early July that a sale was very imminent to O'Donnell and others (Needleman, R. 2802, 2812, 2820-3; Gold, R. 2990-1).

stated in his letter to Joseph dated September 28, 1953 (Exhibit 96):

> ". . . but what can be done in the sense of having something tangible to hang our hats on to substantiate our claim for compensation. I don't know, but you know this guy a lot better than I do and perhaps you know the answer.
>
> "I believe you should pursue the matter further with O'Donnell without too much delay . . ."

—which Joseph did 20 months later when his attorneys wrote to O'Donnell and the other defendants advising them, for the first time, of Joseph's and Terman's claims (Exhibit 117).

Although Joseph claimed that immediately after receiving O'Donnell's September 22, 1953, letter (Exhibit 96), he turned his file over to Sol Hoffman and did not see it again until the time of his deposition (Joseph, R. 642, 2291-2; Hoffman, R. 1141-4). Hoffman testified that the file was turned over to him as attorney for Terman, not Joseph (Hoffman, R. 1141-4). Terman's Exhibit 551 contains handwritten notes setting forth the names of a number of lawyers and law firms in Seattle, and Exhibit 553, a letter dated June 23, 1954, from Joseph to Lee Olwell (a Seattle attorney and one of the attorneys listed in Exhibit 551), indicates that Lee Olwell, as Terman's attorney, considered the matter of his claim for a commission or finder's fee. A year later this action was commenced by Joseph through one of the Seattle law firms named on Terman's list of possible lawyers (Exhibit 551).

Terman, to help Joseph prepare for his deposition, went from Beverly Hills to Chicago just a few days

before Joseph's deposition was taken by defendants, which was some time after the taking of the depositions of defendants by plaintiff. He took his voluminous file with him (Terman, R. 3892-3; Joseph, R. 2290). Joseph, during his deposition, admitted that his memory was very poor about Kinzua, and he continually tried to refresh it from Terman's memos and file, which Terman left with Joseph and his lawyers (Joseph, R. 2290-1).

Terman, upon his return to Beverly Hills and shortly before the taking of his deposition, supplemented his file with many new exhibits which are commented upon at pages 69-73 hereof. Terman was in attendance during both sessions of the Seattle trial.

Shortly before the trial of this case commenced, Joseph, through his attorney, Stanford Clinton, commenced an action in the State of New York in which he sues on behalf of himself and Terman, setting forth that Terman is entitled to the imposition of a constructive trust for 5% as well as substantially duplicating Joseph's 50% claim in this action (Exhibit 70).

Just shortly before the trial of this case, Terman commenced an action in Los Angeles, claiming a right to a constructive trust in 5% of the Kinzua properties, and a right to a commission in the alternative, setting forth that Joseph, one of the defendants named therein, is in accord with his claim (Exhibit 702). During the trial of this case, Terman identified Stanford Clinton, Joseph's chief attorney herein, as his attorney also (Terman, R. 1397).

It is clear that, if not a joint venturer with Joseph

in this suit,[36] Terman has a very direct interest in its result. If Joseph could establish his claim, Terman, as well as Joseph, would be a joint venturer with O'Donnell and the other defendants—Terman for his 5% and Joseph for his 50%. In fact, Terman in his California suit so claims (to be a joint venturer) and sets forth that Joseph agrees with this (Exhibit 702). If this suit is really an attempt to coerce payment of a commission or finder's fee (as well it may be), Terman, through his claim of being a joint venturer with Joseph, may hope to get around an otherwise insurmountable statute of fraud problem, a statutory requirement that

---

[36] In which event, Terman would be an indispensable party, as he also appears to be in the New York suit which Joseph brings to impress a trust upon certain interests in the Kinzua properties in his and Terman's behalf (Exhibit 701). Although Joseph testified that he was bringing this suit only on his own behalf, personally (Joseph, R. 589), if the story of his committed Chicago group (which appellees deny), were believed, Joseph would also be a joint venturer with such "investors" as well as being a joint venturer with Terman. In such event, these allegedly "committed investors" and Terman would be indispensable parties plaintiff and since they were not joined as parties plaintiff, the cause of action would be fatally defective for that reason alone.

See: Fed. Rules of Civ. Proc., Rule 19(a), 28 U.S.C.A.; *Grant County Deposit Bank v. MacCampbell*, 6 Cir. 1952, 194 F.2d 469, 31 A.L.R.2d 909; *Charne v. Essex Chair Co.*, D. N.J. 1950, 92 F.Supp. 164; *Chidester v. City of Newark*, 3 Cir. 1947, 162 F.2d 598; *American Insurance Co. v. Bradley Mining Co.*, N.D. Cal. 1944, 57 F.Supp. 545; *Calcote v. Texas Pacific Coal & Oil Company*, 5 Cir. 1946, 157 F.2d 216, 167 A.L.R. 413.

The defense of failure to join indispensable parties is not waived by failure to raise it prior to the trial; it may be raised at any time. Fed. Rules of Civ. Proc., Rule 12(h), 28 U.S.C.A.

Failure to join indispensable parties plaintiff is a defect which cannot be remedied by amended or supplemental pleading, or by assignment after suit has been commenced. See: *Bowles v. Senderowitz*, E.D. Pa. 1946, 65 F.Supp. 548; affirmed *sub nom Porter v. Senderowitz*, 3 Cir. 1946, 158 F.2d 435; *Eveland v. Detroit Machine Tool Co., E.D. Mich.* 1927, 18 F.2d 963; *Chapman v. Griffith Consumers Co.*, D.C. Cir. 1939, 107 F.2d 263.

commission agreements be in writing, a statutory licensing requirement, that one be properly licensed, and a two-year statute of limitations.

b. ***Comment on the credibility of Terman's memos and testimony***

Some ten days before the commencement of Terman's deposition and some few weeks after his return from Chicago, where he had gone with his amazing file to assist appellant in preparing for his deposition (Terman, R. 3892-3; Joseph, R. 2290-1), Terman again reviewed his file with its many diary or memo book entries and the many memo sheets which often duplicated but sometimes supplemented his diary entries (Terman, R. 1239-41, 1305-7). He then added considerable material to his file in the form of many additional handwritten memos, each bearing at the end thereof the date "11-7-55," such as Exhibits 301, 307, 319, 331, 366 and 309 (Terman, R. 1319-20).

In almost all cases these 11-7-55 exhibits were only excerpts from or summarizations of diary entries, but occasionally the new sheet enlarged upon the earlier material, such as in Exhibit 309, dated March 27, 1952, at the top and November 7, 1955, at the bottom. For here, his memo book entry (Exhibit 307) is considerably enlarged upon. Among other things, he mentions the purchase price as "perhaps around ten or twelve million dollars," and Coleman's name as president in Exhibit 309; Exhibit 307 says nothing about either. In view of the fact that there was evidence enough to the effect that neither Terman nor Joseph then knew the twelve million dollar asking price (Needleman, R.

2719; Joseph, R. 375; Chinn, R. 909-10, 919-21) to result in the trial court's finding that they did not (Oral Opinion, R. 4256), this addition is not entirely insignificant. A second notorious example is Exhibit 301, dated March 22, 1952, at the top and November 7, 1955, at the bottom, wherein Terman enlarged upon his prior memo book entry (Exhibit 303) by adding "approximate price of deal of about twelve million," Harry Joseph's name, and his connection with a "mammoth timber deal in New England years back."

With respect to other similar exhibits not bearing the date November 7, 1955, at the bottom thereof, Terman testified on trial and on deposition that they were all contemporaneous memos and, at the time of his deposition, November 17, 1955, admitted that he had on November 7, 1955, when reviewing his file, prepared the exhibits bearing date November 7, 1955 (Terman, R. 1319-20, 1343, 1349-50). However, some very few months later at the time of the resumption of his deposition on March 6, 1956, he testified not once but several times, and even after being thoroughly apprised of the fact by defendant's counsel and put on guard by his own attorney, that Exhibit 301 (being one of the recently prepared yellow sheets) was the contemporaneous memo of the event covered, and this in spite of the date 11-7-55 appearing on the bottom thereof, which date he then explained as the date he had attached Exhibit 301 to Exhibit 303 (Terman, R. 3900-8).

At the time of trial, with respect to the same Exhibit 301, he first testified several times the same way, to the effect that this was a contemporaneous memo prepared

on or about March 22, 1952 (Terman, R. 1302-4). But after a very convenient recess, he finally got on the right track (Terman, R. 1319-20). It would seem that this performance justifiably raises a question as to just when the various other very similar-appearing memos, such as Exhibts 302, 304, 327, 328, 330, 335, 340, 356, 358, 359, 360, 361, 374, 376, 379, 423, 394, 395 and 396 were prepared—a day or two after the events were cited or at some much later time when Terman reviewed his file for suit-bringing purposes? If he could get confused about a memo prepared just a few months before, bearing a date November 7, 1955, at the bottom, just what reliance can be placed upon any of Terman's many memos as representing a contemporaneous memo made of an event which just happened?

O'Donnell and Chinn both testified that Joseph was surprised at the twelve million dollar purchase price (O'Donnell, R. 1638, 1643; Chinn, 919-21). Joseph said he knew it beforehand (Joseph, R. 325). Exhibits 309 and 301, both dated 11-7-55, both indicate knowledge of this price as early as March 22, 1952. Could Terman's purpose in creating these two exhibits, one of which he claimed was a contemporaneous March 22, 1952, memorandum, have been to prove the point?

Exhibits 329 and 350, dated September 23, 1952, and November 13, 1952, respectively, are diary sheets from Terman's memo book. Both contain the name of O'Donnell. It is submitted that Terman did not even know O'Donnell's name at the time of the diary entry dated September 23, 1952 (Exhibit 329). It is dated before defendant Chinn's visit with Joseph in Chicago on

October 16, 1952 (Joseph, R. 334-5; Chinn, R. 817-8). Even Joseph admits that it looks like O'Donnell's name was added after the diary entry of November 13, 1952 (Exhibit 350; Terman, R. 4004). Just when were these exhibits prepared?

Terman's memo sheet of 12-16-52 (Exhibit 379) sets forth that Needleman said he would see that Terman "was protected on commission as no deal would be made unless he knew about it." Witness Needleman denies such a statement (Needleman, R. 2790). Comparing this memo exhibit with a diary sheet of like date (Exhibit 377) and noting that witnesses Needleman and Gold (Needleman, R. 2802, 2812, 2820-3; Gold, R. 2990-1) claim that although they knew, they did not advise Terman of O'Donnell's name as a prospective purchaser in July of 1953, is it surprising that appellees surmise that like Exhibit 301, Exhibit 379 was prepared long after the date it bears to prove the point that Needleman would protect Terman on commission.

Terman testified that Exhibit 302 was the notes he made at the home of Mr. Needleman on or about March 22, 1952 (Terman, R. 1283-4) and that he got the paper on which it was written at Mr. Needleman's home "as close as I can remember it" (Terman, R. 1283). However, faced with the phone numbers for Joseph contained therein and the reference to Joseph's Chicago bank, he quickly denies ever saying it was prepared at Needleman's home (Terman, R. 1283-5). When was this exhibit created?

While appellant made much of Terman's memo exhibits in the depositions, and considerably less at the

time of trial, it is not surprising that they come in for very little comment by appellant in his brief. But, obviously Joseph's testimony was patterned after his own memos (the incredibility of which is hereafter commented on), and Terman's, even when they just didn't fit the facts, such as Exhibit 404 (the March 10, 1953, memo having to do with getting Price into the woods), and Exhibits 386 through 389, (the memo of December 22, 1952 having to do with the ordering of the car of lumber) (Joseph, R. 2437-50).

Terman's memos are unreliable and incredible hearsay undeserving of the court's consideration.[37]

2. Purely exploratory nature of conduct of parties

a. *Attempts to find out first what was for sale*

Appellant characterizes the first meeting with the agents of Kinzua's stockholders on November 19, 1952, as a meeting to start negotiations for "the purchase of the multi-million dollar Kinzua lumber empire" (Appellant's Opening Brief, p. 12), rather than as

---

[37] In *Quon, et al., v. Niagara Fire Ins. Co. of New York, et al.*, 9 Cir. 1951, 190 F.2d 257, 260, this court quotes with approval from Wigmore on Evidence as follows:

" ' . . . it needs to be insisted, in opposition to the popular and natural view which tends to thrust itself forward at trials, that *a writing has no efficacy per se*, but only in consequence of and dependence upon other circumstances external to itself. The exhibition of a writing is often made as though it possessed some intrinsic and indefinite power of dominating the situation and quelling further dispute. But it needs rather to be remembered that a writing is, of itself alone considered, nothing,—simply nothing. It must take life and efficacy from other facts, to which it owes its birth; and these facts, as its creator, have as great a right to be known and considered as their creature has . . . . There is no magic in the writing itself. It hangs in mid-air, incapable of self-support, until some foundation of other facts has been built for it.' 9 Wigmore on Evidence, 3rd Ed., 5."

what it was in fact, a meeting with authorized representatives of the sellers in an attempt to find out *what was for sale* (Joseph, R. 374-5; O'Donnell, R. 1625). The real nature and purpose of the meeting is illustrated by:

(1) the fact that when Joseph, on his way to his annual winter vacation in California (Joseph, R. 520-1), met O'Donnell and Chinn in Portland to attend the November 19th meeting with Coleman and Casey (the sellers' agents), for practical purposes all that was known about Kinzua was that the property was for sale (Joseph, R. 374-5); and

(2) the fact that during the November 19th meeting, the sellers' agents made clear that, as a matter of policy they would not negotiate with O'Donnell, Chinn, Joseph, or anyone else until satisfied that he or they acted as principals, that he or they had sufficient operating capabilities and financial resources to purchase and operate the properties, and until he or they deposited $600,000 as earnest money to inspect and investigate the properties (Joseph, R. 377-9; O'Donnell, R. 1632, 1634).

At the meeting itself, only the barest outline of *what* was for sale was given (O'Donnell, R. 1631-6). The quality and volume of the timber which was obviously the underlying asset, could not be ascertained, assessed or appraised in a Portland hotel room (O'Donnell, R. 1635-6).

O'Donnell's contacts with the sellers' agents and the Kinzua properties from the November 19th meeting until about April 21, 1953, were essentially, if not entirely, directed at "window shopping." Before he could determine if he wanted to negotiate, it was essential to

know for *what* he would negotiate (Dunn, R. 1031-2, 1039; O'Donnell, R. 1729, 1734-5, 1754).

Among the factual matters bearing on the exploratory phases of O'Donnell's attempts, after the November 19th Portland meeting, to find out *what* in fact was for sale, and from that to determine whether he wanted to negotiate for its purchase, are the following:

1. O'Donnell met with his bankers to canvass possibilities of getting information concerning Kinzua, its assets and properties (O'Donnell, R. 1665-9; Chinn, R. 938-42, 945-9; Dunn, R. 1058).
2. On December 3, 1952, O'Donnell advised sellers' agents, Coleman and Casey, that he would not pay $600,000 "to look at any patch of timber" (Chinn, R. 953; O'Donnell, R. 1679).
3. O'Donnell's bankers arranged a meeting with Kinzua's banker, at which sellers' agent Coleman on December 11, 1952, gave O'Donnell permission to inspect the Kinzua properties without the deposit of $600,000 (O'Donnell, R. 1698; Dunn, R. 1024).
4. O'Donnell, for first time, visited the Kinzua properties on December 16, 17 and 18, 1952, but due to weather conditions he was unable to inspect the main bodies of timber (O'Donnell, R. 1765, 1773).
5. The quality and condition of timber observed (O'Donnell, R. 1770-3, 1784-5), problems of effecting operating changes deemed requisite (O'Donnell, R. 1784-6), and the state of health of O'Donnell's wife (O'Donnell, R. 1924-30, 1937), together with the lack of interest of Kesterson, whom O'Donnell had taken with him on the examination trip as a potential investor and mill operator (O'Donnell, R. 1775-7), caused O'Donnell to determine not to pursue the Kinzua matter (O'Donnell, R. 1796). On

December 19, 1952, O'Donnell advised both sellers' agent Coleman and Joseph of this decision (O'Donnell, R. 1777-9, 1783-4).

6. O'Donnell's interest in Kinzua was somewhat revived during early January, 1953, by reason of improvement in his wife's health (O'Donnell, R. 1814-5), the possible investment interest of another experienced lumberman (O'Donnell, R. 1424-7, 1814-5, 1826-7), and the possibility of equity participation by A. C. Allyn, Chicago investment banker (O'Donnell, R. 1817). Arrangements were made in late February or early March with the sellers' agents for a timber examination as soon as snow conditions would permit (O'Donnell, R. 1832-6), and in late March O'Donnell received a favorable report on the Kinzua timber from Mr. Price, a timber engineer (O'Donnell, R. 1836-9).

7. In order to determine whether negotiations for the purchase of Kinzua should be commenced, O'Donnell advised others with whom he had discussed Kinzua of the good timber report, and asked if they were interested in proceeding as potential investors (O'Donnell, R. 1839-41, 1947-8; Marshall, R. 3354). He arranged with the sellers' agents for a further inspection of the Kinzua plant site (O'Donnell, R. 1949-51; Marshall, R. 3354-5), and for a meeting on April 21, 1953, to commence negotiations (O'Donnell, R. 1852; Marshall, R. 3355-6). From that date forward, negotiations proceeded to an eventual conclusion on August 17, 1953 (Dunn, R. 1031-2, 1037-9). Prior to that date, activities were limited to finding out *what* was for sale (Dunn, R. 1039).

It is submitted that not only was the matter simply in an exploratory stage on the occasion of the November 19, 1952, meeting with sellers' representatives, but that

it remained so at least until April 15, 1953. When Joseph claimed to have entered into his joint venture agreement with O'Donnell, they had not even decided to negotiate for the purchase of Kinzua but were in Portland, as O'Donnell quoted Joseph, only to "find out what it is all about" (O'Donnell, R. 1625).

b. *Joseph's lack of knowledge about Kinzua belies his story*

Appellant in his argument claims that Joseph had "access to a unique and valuable opportunity to acquire an enormously valuable timber empire on extremely favorable terms" (Appellant's Opening Brief, p. 9), and that he at all times intended to and was "eager to enter on the purchase of this great enterprise" even prior to talking to Chinn or O'Donnell or to the sellers' agents on November 19, 1952 (Appellant's Opening Brief, p. 11). Not only does appellant contend that from the very beginning he intended to purchase, but likewise it is contended that the same was true of O'Donnell and that the findings of the trial court to the contrary and with respect to the exploratory nature of the November Portland meeting and subsequent discussions are erroneous (Appellant's Opening Brief, pp. 46-7).

The trial court in its oral opinion said:

> "... I don't think that Mr. Joseph knew very much about Kinzua on the evening of November 18th and certainly O'Donnell knew very little about it at that time.
>
> "It is difficult for me to believe that a man like O'Donnell who has lived as long as he has and been in business as long as he has and has stayed

> out of bankruptcy as long as he has, would buy a 'pig in the poke' within a matter of a few hours of meeting a man that he never had seen before excepting sometime long prior in St. Louis and then only across the room, a man as to whom he knows practically nothing; that he, O'Donnell, would immediately and readily over a casual drink agree to a 50-50 joint purchase in a transaction that was going to run into multiple millions of dollars. I don't believe it . . ." (R. 4256-7)

About all that Joseph knew about Kinzua when he claimed his joint venture agreement was made with O'Donnell was that it was for sale and involved large timber holdings, a town and mill site and a common carrier railroad (Joseph, R. 374-5). Joseph had no experience in timber, logging, sawmill or lumber manufacturing operations (Joseph, R. 487-8). On the face of it then, Joseph was in far less of a position than was O'Donnell, an experienced timber man and lumber manufacturer (O'Donnell, R. 1406), to even hazard a guess as to whether he might be interested when and if he in fact found out what was for sale.

Little was added by the sellers' agents in the November 19th meeting to give Joseph any better idea of what his "unique and valuable opportunity" was (O'Donnell, R. 1635-6, 1774). Although after the meeting he at least knew the asking price and terms, the claimed timber volume, and net quick position, he hadn't seen and couldn't see what his "unique and valuable opportunity" was until (1) he put up $600,000 (which he couldn't do); (2) showed he had operating capabilities (which he didn't have); (3) satisfied the sellers'

agents that he was acting as a principal (as to which we point out there is room for conjecture); and (4) demonstrated the necessary financial capabilities (which he didn't have).

O'Donnell, an experienced lumber manufacturer, clearly was in no great rush to pick up this so-called "unique and valuable" opportunity even late in March of 1953 after he had been given the benefit of checking the timber, as is apparent from the terms of the purchase agreement (Exhibit 114).

Possibly realizing the absurdity of the "eager to enter on the purchase of this great enterprise" story, especially as of November 18, 1952, appellant, at the bottom of page 26 of his brief, makes another equally absurd statement to the effect that: ". . . as is undenied, the Kinzua interests were only dealing with one prospective purchaser at a time. Therefore, since Joseph was the one who originally contacted the Kinzua interests through Coleman, the opportunity to deal with them was peculiarly his . . ." (Appellant's Opening Brief, pp. 26-7).

To support this "undenied" assertion, reference is made to Joseph's testimony that sellers' agent Coleman told him of a phone conversation which Coleman had with O'Donnell on December 19, 1952, in which O'Donnell told Coleman he was not going to pursue Kinzua further. Joseph further testified that Coleman told him that he then told O'Donnell that he didn't want to talk to anybody else about Kinzua; that it was Joseph's deal! (Joseph, R. 442-3).

For at least three good reasons, the trial court re-

fused to believe Joseph's hearsay testimony of Coleman's and O'Donnell's December 19, 1952, telephone conversation (Finding of Fact VII(2)):

(1) In the first place, O'Donnell, as one of the participants, refutes it (O'Donnell, R. 1779-83, 1938-9).

(2) In the second place, Coleman did, in fact, talk to others about Kinzua (Needleman, R. 2752-3; Exhibits 369, 358, 374).

(3) In the third place, appellant's counsel could have tested Joseph's version of this conversation (along with other fundamentally conflicting testimony) had he dared to accept the suggestion of opposing counsel that the depositions which they had taken of Coleman and Casey be put in the record as part of their case (R. 2001-2).

The sellers' agents did in fact advise Joseph, O'Donnell and Chinn at the Portland meeting that their policy was to deal only with principals who were prospective purchasers of operating and financial ability, and then only on payment of $600,000 for a look (Joseph, R. 377-9; O'Donnell, R. 1634; Chinn, R. 915). *If* Joseph had passed the sellers' agents' tests and put up the $600,000, he undoubtedly would have been in a position to negotiate for a time specified on a "unique and valuable basis"—then he might have been able "to peddle the deal" as he suggested to O'Donnell following the Portland meeting of November 19, 1952 (O'Donnell, R. 1643-5; Chinn, R. 924-5). As a matter of fact, it probably is not insignificant that Coleman would not follow up on Terman's attempt to get an entré for Joseph (Terman, R. 1169) until O'Donnell and Chinn

had made their possible interest in Kinzua known to Terman during their Los Angeles visit of November 6, 1952 (Terman, R. 1225-6; Exhibit 340). Terman, then, for the first time, had a real live principal with which to get around the sellers' agents' known aversion for other than principals (Joseph, R. 377).

3. Joseph's financial inability belied his claimed investment interest in Kinzua

Joseph in his complaint alleges that on November 18, 1952, he undertook with the defendant O'Donnell to buy half of the twelve million dollar Kinzua purchase (Complaint, IV, R. 4-5). However, in his deposition and during trial he testified to several different versions of the alleged agreement (Joseph, R. 374, 594-6, (Dep.) 2311). All the versions were to the effect that if it looks good to ourselves (Joseph's unidentified and non-existent group), we will "raise half the money" (Joseph Dep., R. 2311) or "take half or a 50% interest" (Joseph, R. 374, 594-6). He further testified he was representing only himself in the action (Joseph, R. 589).

Joseph in his deposition and at trial claimed that he had determined to invest $250,000 personally (Joseph, R. 483, 783) and $250,000 on behalf of his family corporation (Joseph, R. 483). Joseph's assets during the years 1952 and 1953, the period with which we are concerned, consisted almost exclusively of his 60% to 65% interest in his family corporation and a few undivided interests in tracts of unimproved real estate in and about Chicago (Joseph, R. 701-2, 721; Fields, R. 1195-7, 1205-6). Joseph had borrowed almost the full amount

of the cash surrender value of his life insurance policies (Joseph, R. 687, 745). The largest single investment Joseph had ever made was less than $40,000 (Joseph, R. 677-8), and his net worth in these years, exclusive of the value of his interest in his family corporate business, based upon cost of purchase of interests in the unimproved real estate ventures, was approximately $30,000 (Fields, R. 1195-7, 1205-6). Joseph testified that he would not dispose of his family corporation (Joseph, R. 721), and that he believed in spreading out and diversifying his investments (Joseph, R. 677). Joseph borrowed from his friend Samuel C. Horowitz approximately $30,000 in April of 1953 to make possible his investment participation with Horowitz in a real estate venture he had helped to develop (Horowitz, R. 1485-7).

Joseph's family corporation, Joseph Lumber Company, was engaged in a wholesale and retail lumber yard business in the city of Chicago (Joseph, 315-6). Because of condemnation of a portion of its main yard, Joseph Lumber Company was required over a period of years from 1951 to 1955 to purchase a building site and to construct appropriate facilities (Callner, R. 2139-43). $250,000 mortgage bank financing of said company was required for such purpose (Joseph, R. 751-4). Its financial condition in 1953 clearly did not justify outside investments (Joseph, R. 756-8).

Neither the family corporation nor Joseph had ever had experience in the operation of lumber mills or logging operations (Joseph, R. 314, 487-8).

It is more than clear from this financial picture alone

that Joseph had no intention or capability of investing, as he testified, a total of $500,000, or any small part thereof, in the Kinzua picture.

VI.

Analysis of Claimed Admissions of O'Donnell, the Ballooned Exhibits and Appellant's Documentary Evidence

Appellant concludes his brief by saying that—

> "... We think that the evidence herein cited overwhelmingly establishes, *largely from the admissions of the defendants and from documentary evidence,* that the findings, conclusions of law ..., insofar as they purport to find against the formation and continuing existence of a joint venture between O'Donnell and Joseph ... are clearly and manifestly erroneous." (Appellant's Opening Brief, p. 90) (Emphasis supplied)

Appellant, then, bases his case on what he labels "admissions" and "documentary evidence" and relies upon such "evidence" to upset the trial court's findings, and to carry the heavy burden of proving the right to a constructive trust by reason of joint venture. At pages 45 to 55 hereof, we point up the untenable character of appellant's attempt by erroneous assumptions and already discredited interpretations to find a legal basis to get around the trial court's findings.

The trial court's observation in his opinion as to documentary evidence was as follows:

> "I don't think there ever was so much as a full-length or formal letter, and none of Joseph's notes express any terms of an agreement between them, recite it, or even refer to it. I can't imagine that

> Mr. Joseph is so guileless that he would be involved in a deal of this magnitude with a man that he had very little acquaintance with, without at least dropping him a letter expressing pleasure at meeting him and confirming an agreement made, or in some way or other making some recital of the essence of it." (Oral Opinion, R. 4257-8)

In light of the fact that as of December 20, 1952, Joseph expressed the possibility that O'Donnell was attempting to "shake him out of the deal" (Terman, R. 1363-4; Joseph, R. 589), the significance of the quoted portion of the trial court's opinion is further accentuated. Certainly, he would not, under such circumstances, have proceeded as he did if his interest was as he claimed and he was suspicious that O'Donnell might be trying to "shake him out".

There are in fact no documents or admissions as claimed by appellant.

A. Claimed Admissions

The claimed admissions and items labeled as "undenied facts" consist of a mixed bag of fact and fancy, none of which are admissions in the legal sense.

At pages 9, 10 and 11 of appellant's opening brief the claimed admissions and the largely denied "undenied facts" are first summarized and thereafter referred to time and time again. The following are comments on each as they appear on those pages:

1. It is a fact, of course, that Joseph brought Kinzua to Chinn's and O'Donnell's attention, and arranged the first meeting on November 19, 1952, with sellers' agents. If Joseph were claiming a finder's fee, and if

he had not represented himself as a principal, this might be a significant fact. With A. C. Allyn, on December 30, 1952 his cloak appeared to be that of one seeking a finder's fee (Allyn, R. 2879). There the fact might have been important.

The non-existence and ridiculous character of Joseph's so-called "unique and valuable opportunity" with respect to his knowledge that Kinzua was for sale, which at page 26 of his brief appellant claims was undenied, was discussed at pages 77 to 81 hereof.

2. On or about December 10, 1952, O'Donnell's attorney, Dunn, outlined to Joseph in a general way a possible plan of operation at Joseph's request to provide him with "ammunition" with which to approach possible Chicago investors (Dunn, R. 1009-12). (See also pp. 106 to 107 hereof.) Appellant's claim that anything different was admitted is false.

3. O'Donnell did not immediately after the meeting with Kinzua's representatives on November 19, 1952 confer with his bankers about financing, as claimed by appellant; he did confer with his bankers in an attempt to use their services in finding out something about Kinzua without the payment of $600,000.00 (O'Donnell, R. 1665-9; Chinn, R. 938-42, 945-9; Dunn, R. 1058) (Exhibit 360). The results were successful and eventually led to O'Donnell's being able to investigate the property and get further facts without the prior deposit of $600,000.00 (O'Donnell, R. 1681-4, 1698; Dunn, R. 1021-4). Another purpose, of course, in going to the banks was to convince Coleman and Casey, as they insisted must be done before they would negotiate, that

in O'Donnell and the Wymans they were dealing with people of integrity, means and operating ability (O'Donnell, R. 1684, 1698; Dunn, R. 1021-2).

4. Next, appellant's counsel comes up with his real "whopper"—he assumes the existence of a joint venture—stating Joseph's testimony "that Joseph and his group would take a 50% interest, and O'Donnell and his group would take a 50% interest," is undenied. But counsel's claim is untrue—Joseph's statement was denied by O'Donnell (O'Donnell, R. 1653-5), and by Chinn (Chinn, R. 905).

This denied testimony of Joseph's, which was found by the trial court to be "incredible and untenable" (Oral Opinion, R. 4261), has been the subject of much comment elsewhere in this brief (pp. 152 to 162 herein). We simply observe here that even in the realm of wishful thinking, appellant's counsel avoid discussing its ambiguous, equivocal, illusionary implications.

Because O'Donnell and Chinn, some 34 months later, could recall only vaguely having been with Joseph at the University Club and later in a night club during the evening of November 18, 1952, appellant's counsel would contend for a rule of evidence that anything that Joseph said during that evening became an undenied fact despite the testimony of both Joseph and O'Donnell that the only discussion relative to the Kinzua purchase prior to the meeting with sellers' agents in Portland on November 19, 1952, was Joseph's statement (made immediately prior to the meeting) that "We will just go upstairs" and find out what it is all about (O'Donnell, R. 1625).

There is ample reason to believe that Joseph's testimony of the events of November 18, 1952, was at best his recreation of a recollection equally as vague as that of Chinn and O'Donnell. As late as June 23, 1954, Joseph, in behalf of Terman, wrote to a Seattle attorney stating that his *notes* indicated that the dinner with Chinn and O'Donnell at the University Club occurred *after* the meeting with the sellers' agents (Exhibit 533). Just when Joseph's "recollection" was again recreated by placing these events *before* the meeting with Kinzua's agents, is unexplained. However, the motive for the revised recreation is clear. O'Donnell and Chinn testified in their depositions taken in September, 1955, that O'Donnell left Portland by private plane for Sacramento immediately after the meeting with the sellers' agents on November 19, 1952, and the plane's log corroborated this testimony. Hence, Joseph realized before his deposition in October, 1955 that there could have been no dinner with O'Donnell at the University Club on the evening of that day.

O'Donnell's and Chinn's depositions likewise supplied an opportunity which he quickly grasped. They testified that they could not recall meeting with Joseph on November 18th. How then, he may have reasoned, could they deny what he testified occurred on that evening?

But, it is difficult to understand how the memory of a man who contends a multi-million dollar joint venture had been created would have to so recreate the events. And where in any event are Joseph's notes that "indicated" the University Club dinner was on November 19th?

The observations of the trial judge seem appropriate at this time:

> ". . . I can't believe and don't believe that Chinn and O'Donnell are such scoundrels and so stupid as originally by deposition to have denied meeting Mr. Joseph the evening of November 18 when in fact they remembered the meeting. It would be ridiculous, in the light of the telegram, hotel registration, and other records of the event which they must have had in mind if they actually remembered the meeting. Moreover, if both of them were that foolish and dishonest, I can't imagine that their counsel would have been so during this period of about a month before the depositions, while they were, according to Mr. Clinton, rehearsing and drilling Mr. O'Donnell and Mr. Chinn for their testimony. I gather the impression that Mr. Clinton feels that Mr. O'Donnell at least went through quite an educational period prior to his deposition. I can't imagine that these counsel would be so inadequate to the situation as not to inquire whether they registered at a hotel or whether they sent any telegrams or whether they had signed any chits. Even if I thought Mr. O'Donnell and Mr. Chinn to be as untrustworthy as the plaintiff contends they are, I couldn't believe them to be so unwise as to deny what they must have known could easily and indisputably be proved." (Oral Opinion, R. 4254-5)

5. Next, we consider the claim that O'Donnell gave Joseph information about newly discovered facts concerning Kinzua. The fact is that O'Donnell did call Joseph a few times after the Portland meeting, and did give him information that he (O'Donnell) had discovered about Kinzua. Joseph, on the contrary, did not

initiate a contact with O'Donnell after mid-December, 1952. (Joseph's letter of February 27, 1953 (Exhibit 52) merely acknowledged O'Donnell's phone call and enclosed a pessimistic forecast of economic conditions in the Northwest lumber industry (Exhibit 46)). Consistent with A. C. Allyn's testimony of his impression that Joseph's interest in Kinzua on December 30, 1952 was that of a broker (Allyn, R. 2879), was Joseph's response to O'Donnell's last phone call to him on March 31, 1953 when O'Donnell asked him, "Now, let's get it straight. How are you? Are you with the Allyn people?" (O'Donnell, R. 1947). Joseph replied, "Yes, I am with the Allyn group. I will be right along with them. You do your business with Marshall" (O'Donnell, R. 1841).

While O'Donnell had no understanding with Joseph and was under no obligation to him, or vice versa, O'Donnell did in fact give Joseph every reasonable opportunity, if he wished it, to participate in the Kinzua acquisition.

6. The next so-called "admitted fact" of which much is made is that the Seattle group "could not finance the entire purchase." Although there is no testimony to that effect, the record does indicate that O'Donnell never contemplated investing more than $500,000 of the down-payment, the Wymans $1,500,000 and Stuchell $500,000 (O'Donnell, R. 1433, 1948; Dunn, R. 1079). Certainly the balance of the required funds had to come from some place. Had Joseph wished to participate in the purchase, his participation would undoubtedly have been welcomed.

The *admitted facts* are that at no time did Joseph agree, promise or offer to participate in Kinzua's purchase; nor, with the exception of A. C. Allyn, did he ever advise O'Donnell of the names of any potential investors nor that he had any investors who were interested in Kinzua; nor did he ever indicate to O'Donnell any possible dollar amount or percentage of participation which he or any other persons might possibly invest in Kinzua's purchase (Joseph, R. 555-6; O'Donnell, R. 1645, 1841, 1867-8, 1947-8). As Joseph stated on March 31, 1953, his interest was with Allyn (O'Donnell, R. 1841, 1947).

7. Appellant next asserts as an "admitted fact" that there was some agreement or understanding between Joseph and O'Donnell that they would "sit down and allocate." Not even Joseph testified that there was any such agreement — appellant's counsel's assertion is based upon a distorted interpretation of O'Donnell's testimony and supported by quotations taken out of context (Appellant's Opening Brief, pp. 33-4). O'Donnell's testimony in this respect is only to the effect of what would have been done, not what was said; clearly, all that O'Donnell had in mind was that obviously if Joseph interested anyone of his Chicago acquaintances, or was interested to some extent himself, all interested buyers, as of the time the matter was no longer in the exploratory stage, would have to agree between themselves what portion of the down payment each would take (O'Donnell Dep., R. 3553-6; O'Donnell, R. 1733-6).

8. Appellant next asserts that "undeniedly, Joseph

worked in Chicago to secure, and did secure, qualified, responsible and fully adequate investors . . ." Since Joseph's claim that he had secured investors was not asserted in his complaint in this suit (Complaint, R. 3-9) or otherwise made known to appellees until Joseph's deposition was taken in Chicago in October, 1955, it could not very well have been formally denied in their pleadings. It has never been admitted by them. There is only one admitted fact with respect to Joseph's claimed investors, and that is *Joseph's admission that he never told O'Donnell, any of the other defendants, or Allyn, that he had one cent committed or even possibly available from any one or anybody, including himself* (Joseph, R. 555-6).

Joseph's implausible recital of circumstances under which commitments of a quarter of a million to one million dollars were purportedly made to him, even before the Portland meeting of November 19, 1952 (Joseph Dep. 2346-53) when he only had "a sketchy outline of the deal" (Joseph, R. 375); a critical evaluation of the testimony of his alleged investors (Chesrow, R. 1507-25; Hoffman, R. 1100-45; Horowitz, R. 1479-1525; Horowitz Dep., R. 4195-7; Lancaster, R. 4228-45; Platt, R. 4206-28; Perlstein, R. 4198-4206; Morris, R. 4170-94); and the existence of incidents creating further doubt about the accuracy of their testimony, [38] together with Joseph's non-disclosure of

[38] Appellant states on page 58 of his brief that Hoffman "discussed Kinzua with Joseph in November of 1952 (Hoffman, R. 1101) and *firmly and definitely committed himself to invest $250,000,* upon the judgment of Joseph (Hoffman, R. 1107)." And Hoffman did so testify, but Joseph in his letter to Terman of August 27, 1953 says, "As a matter of fact, I had a talk with Sol Hoffman, who no doubt you know,

their existence to O'Donnell or Allyn, can only lead one to conclude that Joseph's "investors" were not committed to invest as Joseph claimed.

9. Next, appellant, as part of his so-called admissions, takes isolated portions of the March, 1953 incident involving Joseph's strangely misdated memo of March 10, 1953 (Exhibit 404) (commented upon at pp. 114 to 117 hereof) in an attempt to create an inference that Joseph was told by O'Donnell that *a cruise* was required (Appellant's Opening Brief, p. 43). Joseph's testimony on this point at the trial was categorically denied by O'Donnell (O'Donnell, R. 1841-4), is contrary to the court's finding and the credible evidence (Oral Opinion, R. 4259), and contrary to Joseph's deposition testimony (Joseph Dep., R. 2507). For the reasons stated in the above-referred to comment elsewhere in this brief covering this exhibit, appellees submit that the word "cruise" was first placed in Joseph's mind just before the trial. Joseph obviously did not know what a cruise was (Joseph, R. 610-1), had not used the word in his deposition (Joseph Dep., R. 2507), in his memo of March 10, 1953 (Exhibit 404), or in his report to Terman (Exhibit 407). As stated at pages 116 to 117 hereof, Joseph, faced just before trial with incontrovertible evidence establishing that O'Donnell was in Palm Springs, California, not Seattle, from January 18 to March 23, 1953 (Exhibit 639), and that in particular, he was playing golf and was at the

---

and with whom I have discussed this deal, having in mind that *if he felt the deal was good enough, he might even take a position in it.*" Apparently Joseph didn't think on August 27, 1953 that Hoffman was committed as he and Hoffman testified in 1956!! (Emphasis supplied) (Exhibit 87)

Racquet Club in Palm Springs in the afternoon and evening of March 10, 1953 (Exhibit 638), it became obvious that Joseph's deposition testimony about the March 10, 1953 memo (Exhibit 404) was insupportable. Since O'Donnell had testified that he had called Marshall of A. C. Allyn & Co. on March 30, 1953 and Joseph on March 31, 1953 to advise them of the favorable Price report (O'Donnell, R. 1839-41), it took the "cruise story" that it would take months to examine every acre (Joseph, R. 467) to excuse Joseph's inexplicable silence (and Terman's also) from then on (Joseph, R. 645).

10. Appellant next states that it was admitted that the Kinzua financial statements were not obtained for "weeks" after the last telephone call by O'Donnell to Joseph in March ,1953, and that it was "further months until the essential cruise or inspection of the timber was obtained" (Appellant's Opening Brief, p. 10). Although appellees are at a loss to understand why this is significant, or even pertinent, apparently appellant urges that it somehow supports Joseph's explanation, advanced for the first time at the trial, for his complete silence and inaction from the end of March, 1953 until after he learned of Kinzua's purchase at the end of August.

The fact is that the Kinzua financial statements were obtained by Marshall, with whom Joseph had asked O'Donnell to cooperate (Joseph, R. 557-8), from the sellers' agent Coleman on April 21, 1953 (O'Donnell, R. 1852; Marshall, R. 3371-5), just three weeks after O'Donnell's last call to Joseph. O'Donnell was not

concerned with or impressed by the statements (O'Donnell, R. 1853), and secured them from Marshall only after Allyn withdrew its consideration of Kinzua (Marshall, R. 3381). There is no showing whatsoever that the statements were favorable; in fact, Marshall testified that they would require a lot of explaining (Marshall, R. 3374; Exhibit 564). They obviously did not impress Allyn; he "dropped out" within the week after they were made available (Allyn, R. 2875).

The "cruise" which appellant, at the very late date of the trial, invented to explain his silence of more than four months after being notified that Allyn was dropping its consideration of Kinzua, was never made.[39] Joseph testified that the "cruise" he was talking about required an examination of every one of the 110,000 acres of Kinzua timber (Joseph, R. 610-1) which would take several months to complete (Joseph, 608-9). When and by whom this cruise theory was suggested is not disclosed. It does not appear in his discredited March 10, 1953 memorandum (Exhibit 404), which on deposition he testified was the sole basis of his recollection that he even had a conversation with O'Donnell in March, 1953 (Joseph Dep., R. 2507). He further testified that he had no recollection of the conversation except as appeared in the memorandum itself (Joseph Dep., R. 2507). When asked upon cross-examination "when did you first think of that [the cruise] as an explanation for not having called O'Donnell after the March call," Joseph replied, "I just don't recall now when did I first think about it" (Joseph, R. 609).

---

[39] The appellees caused a "check cruise" requiring only a few weeks to be made of the Kinzua timber in June, 1953.

We suggest that appellant's "cruise" story was born of his counsel's desperation to find some conceivable excuse for the silence of Joseph (and his associate Terman) after Allyn called and told him he was dropping the matter, which silence, without more, refutes and renders untenable Joseph's position.

11. Lastly in the list of appellant's claimed admissions is the subject matter of the inflated bulge in the middle of appellant's opening brief. In tabloid taste and style at pages 59 and 60, appellant's counsel blow up two letters (Exhibits 93 and 87), using therefore the paper equivalent of 48 pages of brief.

B. Ballooned Exhibits

1. Exhibit 93—O'Donnell's September 22, 1953 letter

The first of these (Exhibit 93) is a letter dated September 22, 1953 from O'Donnell to Joseph in reply to Joseph's letter of August 31, 1953 (Exhibit 90) which the trial judge characterized "as a nice letter to O'Donnell" (Oral Decision, R. 4260). Joseph's letter, written after he had read of the Kinzua purchase, inquired of O'Donnell concerning the Kinzua purchase. Appellant's counsel, as he does in his opening brief, tried to make much of O'Donnell's reply before the trial court, who in his oral opinion stated with respect to it:

> "It certainly is clear that O'Donnell didn't take any counsel from anyone before he wrote it. He just dashed it off . . ." (Oral Decision, R. 4260)

Assuredly, O'Donnell's reply of September 22, 1953 is not a letter that would have been written had O'Donnell any thought or suspicion that Joseph claimed to be

a joint venturer with him (O'Donnell, R. 1908-9). Terman, upon reading O'Donnell's letter, described it as "a pretty frank statement . . . but what can be done in the sense of having something tangible to hang our hats on to substantiate *our claim for compensation,* I don't know . . . I believe you should pursue the matter further with O'Donnell without too much delay". . . (Emphasis supplied) (Exhibit 96). Joseph "pursued the matter" 20 months later by asserting his 50% claim of joint venture as a means of "substantiating our claim for compensation" (Exhibit 117).

Assuming that A. C. Allyn had not called Joseph to advise him that he and his associates "were getting out," [40] the reference in O'Donnell's letter to the "lost interest (by your group) in the Kinzua deal because of other utility deals, et cetera," might have surprised Joseph, but it would not have misled him in any way to his detriment. Joseph knew who O'Donnell was referring to as "your group" and who had lost interest in the Kinzua deal—certainly it was A. C. Allyn & Co., who had been very much in the minds of Joseph and Terman (Exhibits 116, 55, 48). After all, way back in early January Joseph admittedly told O'Donnell to cooperate with A. C. Allyn & Co. and give them such information as he had to Marshall (Joseph, R. 557-8). In any event, the statement was not false as labeled by appellant.

Allyn testified and the trial court found that Allyn did in fact drop out on April 27, 1953 (Allyn, R. 2875-

---

[40] Allyn did call Joseph and so advise him on or about April 27, 1953 (Allyn, R. 2876; Joseph, R. 633-4).

6). O'Donnell had been relying upon Allyn's participation for almost half of a $4,800,000.00 down payment. Had O'Donnell not believed in April, 1953 that Allyn would participate to that extent if Kinzua's purchase were otherwise deemed feasible, it is doubtful that he would have commenced an investigation of Kinzua or that the sellers' agent Coleman would have been receptive to his interest (O'Donnell, R. 1849, 1951-2; Marshall, R. 3361; Exhibit 564). Upon being advised of Allyn's dropping out, Coleman stated to O'Donnell, "I guess, Harry, that lets you boys out then" (O'Donnell, R. 1441). Coleman then demanded a prompt answer as to whether O'Donnell could and would go forward and required O'Donnell to call back the next day (O'Donnell, R. 1441).

Although Allyn's drop of interest in the negotiations was statedly only for some weeks, it is submitted that it was tantamount to and regarded by O'Donnell as well as Allyn as a complete drop out (Allyn, R. 2875-6; Marshall, R. 3363-4, 3379-80; O'Donnell, R. 1955).

While O'Donnell was inaccurate, as he admitted (O'Donnell, R. 1906), in saying the matter lay dormant for a couple of months, this certainly did not mislead Joseph in any way. In fact, from December 19, 1952, until the favorable report on the timber in late March, a period of some three months, the matter was essentially dormant. And O'Donnell did run into Webster in Los Angeles some time prior to O'Donnell's interest in Kinzua at which time Webster had informed him of his potential interest in such a timber transaction (O'Donnell, R. 1900, 1908). As a matter of fact, O'Don-

nell wrote this letter a few weeks after he found himself confronted with the responsibilities of what appellant's counsel refer to as "a vast timber empire" (Appellant's Opening Brief, p. 11). Not only was new management involved, the operation had to be changed, the corporations dissolved, new banking arrangements made, mortgages drafted, and the very extensive improvements to the mill which eventually increased its production from about thirty million feet to sixty million feet a year had to be planned and put into execution (O'Donnell, R. 1785-91, 1918-9, 1981-4). *Obviously, unless O'Donnell were on his guard as he would have been had he felt Joseph claimed that he was in any way a joint venturer with him, he would not attempt to recall, in accurate detail and time sequence the events of some months past.* O'Donnell, in his "dashed-off" letter, easily could have confused, *as he did,* the time sequence; but such confusion was not a designed or intentional one and it did not in fact confuse or mislead Joseph.

2. Exhibit 87—Appellant's August 27, 1953 letter

With respect to the second blown up letter (Exhibit 87), the August 27, 1953, letter from Joseph to Terman, appellant's counsel on page 60 of appellant's opening brief say that this letter discloses: "Joseph's spontaneous indignation upon discovering O'Donnell's treachery"; and "Joseph's fidelity to and his concern for Terman, who was left out in the cold by O'Donnell's maneuver"; and "Joseph's determination to obtain redress."

Certainly just what this letter shows may be a matter of much conjecture. In making our own conjectures

of its meaning, we consider with it Terman's reply of August 30, 1953 (Exhibit 89), Terman's letter to Joseph of September 18, 1953 (Exhibit 92), Joseph's letter to Terman of September 25, 1953 (Exhibit 94), and Terman's letter to Joseph of September 28, 1953 (Exhibit 96).

Aside from self-serving purposes, it would appear that Joseph felt that Terman probably knew something about the transaction and he points out to Terman, "However, it would seem to me that your friend Needleman should have said something to you about this" (Exhibit 87). After all,

(1) Needleman, the attorney for the largest of the selling stockholders of Kinzua had told Terman originally about the fact that Kinzua was for sale (Terman, R. 1152);

(2) Needleman worked with Terman and prepared a draft of a letter for Terman to send to Coleman in an unsuccessful attempt to get Coleman to contact Terman and give him information about Kinzua (Terman, R. 1165-9). Terman in his memo of September 22, 1952, refers to Needleman, "who is guiding me." (Exhibit 328);

(3) Terman conferred often with Needleman relaying information Terman picked up from Joseph about O'Donnell's activities. This was a direct conduit from a prospective purchaser (See pp. 62 to 64 hereof) Exhibit 89; Needleman, R. 2752-3);

(4) Needleman knew in early July that O'Donnell was one of the purchasers of Kinzua. (Needleman, R. 2820-2).

Terman in his memo of December 16, 1952 (Exhibit 379), states that Needleman "said he would see that I was protected on commission as no deal would be made unless he knew about it and would see to it that I was protected on the commission." Needleman denied that he made any such a statement or undertaking (Needleman, R. 2790). Joseph was well aware of Terman's close connection with the attorney for the largest stockholder (Joseph, R. 324-5).

In his reply to Joseph's comment about Needleman, Terman stated that he had asked Needleman for an explanation and that Needleman implied he was not aware that O'Donnell was one of the purchasers (Exhibit 89). (In fact, Needleman did know that O'Donnell was a purchaser (Needleman, R. 2820-3)). Terman further stated: "I told Jim (Needleman) that it was inconceivable that Coleman would enter into any transaction without calling you and me in as he knew that you had invited O'Donnell into the deal, after I submitted it to you." Terman next referred to the fact that Needleman knew almost from the beginning "that you had invited O'Donnell and a Mr. Chinn into the deal and that I was to receive a fee" and that, "Every time you and I had a telephone or letter communication, I would immediately advise Needleman or Gold of the facts, . . ." (Exhibit 89).

After Joseph had forwarded to Terman a copy of O'Donnell's September 22, 1953, reply to Joseph's friendly inquiry about the sale of Kinzua, Terman wrote to Joseph on September 28, 1953, stating—

". . . but what can be done in the sense of having

> something tangible to hang our hats on to substantiate *our claim for compensation,* I don't know . . . I believe you should pursue the matter further with O'Donnell without too much delay and I would like to hear from you at your earliest convenience." (Exhibit 96)

If Terman ever "heard" from Joseph in response to this letter, the record doesn't disclose it. Nor did Joseph pursue the matter further without too much delay. Not until some 20 months later when his Seattle attorneys made demand upon the appellees (Exhibit 117), did Joseph contact O'Donnell or any of the other purchasers, or otherwise inform them of his claim (Joseph, R. 654, 661).

From the foregoing letters the following would seem to be fair conjectures of the meaning of Exhibit 87:

1. That Joseph upon hearing of the sale and knowing of Terman's desire to find some place in the Kinzua picture from which to claim a commission was well aware that in using Joseph for this purpose Terman had picked the "wrong horse" and moved to cover up; he was aware of Terman's very close relationship with Needleman, the attorney for the largest of the selling stockholders, and felt that Terman should at least in part put the blame on Needleman. Joseph knew he had let the Kinzua matter drop after he was no longer "pushed" by Terman and that he had not told either O'Donnell or Allyn of any claim of Terman to a commission. He knew that Terman, now that a sale had been made to one whose attention he, through Joseph, had brought it, would want to claim compensation from the sellers or the buyers; and he knew that he had

worked with Terman in appearing as a principal from or through whom Terman might believe he could claim a commission.

Terman made it clear in his letter of August 30, 1953 (Exhibit 89), that he was at the very least, exasperated with Needleman for permitting a sale to be made without informing him before its consummation. From the tenor of this letter it would appear that Terman was well aware that his position from which to claim a commission through the sellers or the buyers was not a legal one, but instead, if his words could be taken at face value, that he felt that Needleman would see that a deal was not made unless he somehow or other was able to insist on a commission in some manner or other. After all, Needleman had brought Terman into the picture.

It is noteworthy of comment that in none of the letters is there any reference to Joseph's claim that he was entitled to 50% of the deal or that he had in fact notified O'Donnell of Terman's right to a commission!

2. Just what Terman meant in his September 28, 1953, letter about substantiating "our claim for compensation" is also a matter for conjecture (Exhibit 96). This would seem to be a recognition of the fact that he and Joseph were working together in some way to get a finder's fee or commission out of the Kinzua sale from somebody or other. If Allyn had come into the picture, undoubtedly Joseph would have shared any finder's fee he got with Terman. As heretofore mentioned, once Allyn came into the picture on December 30, 1952, all interest in O'Donnell seemed to disappear. By that time, through the use of O'Donnell, Joseph

had really found out what was for sale and when A. C. Allyn came into the picture, one from whom a finder's fee could be claimed was for the first time available. O'Donnell thereafter only served as the necessary one with operating experience to interest Allyn (Allyn, R. 2874-5).

However, the inexplicable absence of any further apparent interest even in Allyn after sometime in early March of 1953 remains incredible, as also does the fact that Terman and Joseph both claim that they neither heard nor knew anything about Kinzua (except possibly Allyn's withdrawal of interest, Joseph, R. 634), or made any inquiries about it from the time they last heard that O'Donnell was trying to get Price into the woods to look at the timber sometime in March until Joseph learned of its sale on August 27, 1953). Joseph, in his August 27, 1953, letter to Terman advising him of the sale, commented that certain parties in Chicago had inquired about Kinzua off and on and that he had told them that he was still waiting to hear from O'Donnell (Exhibit 87). If such inquiries had been made, and Joseph really had the interest he now claims in Kinzua, he certainly would have checked either (a) with O'Donnell, (b) with Terman, or (c) directly with Coleman when Allyn told him he was withdrawing his interest. He checked with no one. Even more probably Terman, whose avid interest in finding a place from which to claim a fee or commission from Kinzua is clear, would certainly have inquired during the long period involved from both Joseph and certainly Needleman, if he had not considered Joseph's interest and usefulness in the

Kinzua matter to have terminated with Allyn's withdrawal.

Joseph's letter of September 25, 1953, to Terman (Exhibit 94), commenting on O'Donnell's September 22, 1953, letter (Exhibit 93), states that Joseph does not know what O'Donnell is talking about when he refers to Joseph's group dropping out because of other utility deals. As we have heretofore demonstrated, Joseph knew full well what O'Donnell was talking about. Why, unless this was purely a self-serving letter, this was said to Terman is also a matter of considerable conjecture. Was Joseph trying to cover up a failure to have told Terman that Allyn had dropped out? Did he feel that he had not carried his part of their joint efforts to find a place from which to claim a fee or commission and was trying to cover up? But this explanation still leaves unexplained Terman's incredible lapse and apparent loss of interest in Kinzua. Could it be that Needleman requested his friend Terman not to interfere in an imminent sale possibility?

The very least that can be said about the blown-up Exhibit 87 is that it is the subject of many possible conjectures and more plausible explanations than those advanced by appellant.

Just as appellant exaggerated these exhibits physically, it is submitted that their significance is equally exaggerated. Even if all of appellant's inferences were assumed, there is nothing in O'Donnell's or Joseph's or Terman's letters that point up a joint venture agreement between Joseph and O'Donnell.

C. Appellant's Documentary Evidence

1. Appellant's confusion with respect to his document prepared to interest investors

The term "plan of acquisition," coined by appellant's counsel, was first used at the trial (Dunn, R. 1010). The documents so denominated were identified and admitted at the trial as Exhibits 381, 382 and 391. Exhibit 382 is merely a copy of 381. At O'Donnell's and Chinn's discovery depositions they were identified as B and A. Neither witness had ever seen them before and were clearly mystified as to their identity (Chinn Dep., R. 3238-54; O'Donnell Dep., R. 3634-6).

Subsequently, Joseph's discovery deposition was taken where these Exhibits 381, 382 and 391 were identified respectively as Exhibits 17, 18 and 16. At his deposition Joseph had at first *no idea* what these documents were, exactly how the data was acquired, to whom the documents were given and why. He first testified all three exhibits represented typewritten notes of his conference with Coleman, Casey, Chinn and O'Donnell on November 19, 1952. The information came principally from Coleman. His stenographer had copied his penciled notes of this meeting which he had mislaid or destroyed (Joseph Dep., R. 2325-42). He first testified Exhibit 391, which contained no reference to the Seattle group, was an earlier document than Exhibit 281 (Joseph Dep., R. 2335-6). He later was uncertain whether these notes in their penciled form were made at the meeting of November 19, 1952, or possibly on the plane going south to La Quinta where he planned to spend a vacation (Joseph Dep., R. 2326, 2341). He changed his

story several times in his deposition, each time extending the length of time in which they might have been prepared (Joseph Dep., R. 2377-8). He first testified he gave Allyn on December 31, 1952, Exhibit 382 which contained a reference to a Seattle group being interested in purchasing Kinzua (Joseph Dep., R. 2428). He then testified that he gave him Exhibit 381 (Joseph Dep., R. 2429, 2468). At length, under prodding by defendants' counsel, he finally was forced to reverse his earlier testimony and to admit that he "probably" gave Exhibit 391 to Allyn (Joseph Dep., R. 2468-9; Joseph, R. 552-4). Allyn, incidentally, denied receiving any typewritten material from Joseph (Allyn, R. 2872-3, 2880-1). Joseph was "inclined to believe" he gave copies of one or more of the documents to all potential investors but Perlstein (Joseph Dep., R. 2364). At the trial Joseph testified he received the "principal selling point" in the document from O'Donnell (Joseph, R. 612-3). He could not recall whether anyone else was on the line or not (Joseph, R. 613). He testified at the trial he never recalled having talked to Dunn until he met him during this litigation (Joseph, R. 409). He was "certain" (despite Dunn's testimony to the contrary) he never talked to Dunn before this litigation started (Joseph, R. 411). He testified that he gave these documents to his friends to interest them (Joseph, R. 416-428, 462-3) and, after O'Donnell withdrew, to Allyn on December 30, 1952 (Joseph, R. 448-50, 461-3). He freely admitted his earlier confusion about the copy he said he gave Allyn (Joseph, R. 552-4).

At his discovery deposition, Dunn had only a hazy

recollection of ever having talked to Joseph (Dunn, uncorrected deposition, page 38). He had, however, heard his name (Dunn, R. 3701). Before signing his deposition, Dunn made an appropriate correction of his deposition, as provided by Rule 30(e) of F.R.C.P., recalling detail of his one telephone conversation with Joseph (Dunn, R. 3726-7). At the trial, Dunn testified at some length as to how his recollection of this telephone conversation with Joseph, between December 5 and 19, 1952, had been refreshed (Dunn, R. 1009-10, 1018-19). He testified that O'Donnell told him Joseph wanted "some ammunition to try to interest people in Chicago in the possible purchase of Kinzua" (Dunn, R. 1010). Dunn, after brief investigation, gave Joseph some data he had collected on the Kinzua corporate set-up and some general thoughts he had formulated upon the possible capital gain tax features of a venture of this character (Dunn, R. 1010-1013). He had not been authorized to explore the subject and had only a "general picture" which he conveyed (Dunn, R. 1031-32; 1044-5). O'Donnell corroborated Dunn (O'Donnell, R. 1708-11). The trial court accepted the Dunn-O'Donnell version of the source of the so-called "plan of acquisition" (Finding of Fact V(5), R. 256).

From the foregoing, the following points seem obvious:

(a) Joseph first thought he had prepared and presented these documents to Chinn and O'Donnell at an early stage in the proceeding to interest them. When faced by the ignorance of Chinn and O'Donnell as to the documents, he shifted his position.

(b) Next, he thought they were merely typed copies of

his notes of the meeting held with Chinn, O'Donnell, Casey and Coleman in Portland, Oregon, on November 19, 1952.

(c) Next, he decided that, as the documents obviously referred to incidents which occurred several weeks after the November meeting, they must have been prepared long after his return to Chicago.

(d) It finally dawned on Mr. Joseph that he must have used the documents in some way and probably gave them to persons he was trying to interest. He still was uncertain why one referred to a Seattle group and one did not.

(e) Finally, he realized that Exhibit 391, rather than Exhibit 381, was given to Allyn because by then Joseph had been told by O'Donnell that he was no longer interested. Thus, he planned to substitute Allyn for O'Donnell.

(f) It seems incredible that plaintiff, who claims for over two years before bringing this action that he had a (1) binding contract with O'Donnell, (2) a firm commitment for over 3 million dollars from Chicago investors, and (3) a determination from the outset to hold O'Donnell liable for his alleged breach of trust, *could not even identify from his own file the source, purpose and use of the prospectus on which he claims to have raised the money.*

(g) The *only explanation* is that the casual telephone call, the casual typewriting of the outline of a possible deal, the casual distribution of it to a few people, was never more than a subject of discussion—soon forgotten.

(h) If these documents were of any real significance, why were not copies sent to O'Donnell and Dunn for their information and to corroborate the information conveyed only by telephone?

Not improbably, Exhibit 343, a handwritten slip setting forth timber acreage, and volume, were Joseph's only notes of the November 19, 1952, Portland meeting with Coleman and Casey. Joseph's testimony that these were notes of a phone conversation with Coleman on November 7, 1952, is no more reliable than his first answers that the document prepared in December to interest investors were his notes of the November 19th meeting!

a. Down payment confusion

At the trial Joseph testified sellers' agent Coleman stated at the November 19, 1952, meeting in Portland that the down payment required to purchase Kinzua would be $6,000,000 (Joseph, R. 378-9). During his deposition, he testified first that Terman had told him on October 24, 1952, that the down payment required would be $4,800,000 (Joseph Dep., R. 2250); next he testified that he learned of the $4,800,000 figure from Coleman during the November 19th meeting (Joseph Dep., R. 2320, 2331). When confronted with Exhibit 381, which he claimed at that time were notes of the November 19th meeting, Joseph then testified that both $4,800,000 and the $6,000,000 figures were mentioned (Joseph Dep., R. 2332).

Later in his deposition, however, he changed his testimony yet again stating that only the $6,000,000 down payment was mentioned on November 19th and that he had gotten the $4,800,000 figure from looking at O'Donnell's deposition (Joseph Dep., R. 2376-7, 2424). He further testified that he had no independent recollection of the matter and that he would rely upon Exhibits 381

and 391, which he claimed were his notes of the meeting (Joseph Dep., R. 2376-7). Still later in his deposition, he repeated that he was basing his testimony that $6,000,000 was the down payment named in the November 19th Portland meeting upon his notes of the meeting (Exhibits 381 and 391), *and nothing else* (Joseph Dep., R. 2424-5).

From the foregoing, it seems clear that Joseph's testimony of the November 19, 1953, meeting with the sellers' agents Coleman and Casey was mistakenly based upon the erroneous assumption that Exhibits 381 and 391 were memoranda of that meeting and that Joseph had no independent recollection of it. But, as appellant's counsel concede on page 10 of Appellant's Opening Brief, Exhibits 381, 382 and 391 were not notes of the November 19, 1952, Portland meeting. They were what appellant's counsel label the "plan of acquisition" framed by O'Donnell's attorney Dunn and communicated to Joseph in mid-December, 1952 (Dunn, R. 1010-2) (Also, see preceding section, pp. 106 to 107).

Under these circumstances, Joseph's entire testimony of the November 19, 1952, Portland meeting is, to say the least, unreliable and indicates a strange memory of significant fact for a man who claims he was bound with another as a joint venturer to acquire a multi-million dollar property.

2. Exhibits 386, 387, 388, 389—some queer aspects of appellant's memo of 12-22-52

In the subject memo Joseph purports to set forth the contents of a phone call with Coleman which he claims occurred on December 19, 1952, three days before the

date of the memo. At his deposition, Joseph testified that he wrote this memo in longhand because his secretary was poor, and that she typed it on its date, December 22, 1952 (Joseph Dep., R. 2438). At the trial, he testified that he dictated the memo to his secretary who typed it on its date (Joseph, R. 436-7). The memo is extraordinary for two reasons:

(a) It refers to Joseph's ordering a car of lumber from Coleman but we know from other sources[41] that the car of lumber was not ordered until December 26, 1952—some four days after Joseph insisted he wrote the memo!

(b) It makes no mention of O'Donnell's advising him he was no longer going to pursue the Kinzua purchase, yet we know from the testimony and exhibits furnished by Joseph's own witnesses[42] that Joseph

---

[41] (a) In a transcript of a telephone conversation of December 23, 1952, between Casey and Gold (Needleman's law partner and Joseph's and Terman's conduit), Gold said:

"As a matter of fact, I think he, Joseph, asked [during the conference call of December 20, 1952 (Exhibit 433-C)] if he could somehow or other get a car of lumber shipped from Kinzua to his place in Chicago, so he could see for himself something about the quality of the lumber . . . and that Joseph had asked that we try to get the lumber shipped to him so that he can see for himself on that score. . . . " (Exhibit 43)

(b) Joseph could only substantiate his claimed telephone call to Coleman on December 19, 1952, by a telephone bill showing a call to "Sea" on that date. When shown that this was also an accepted abbreviation for Seattle, he had no comment (Joseph, R. 569-72).

(c) The car of lumber was confirmed by Kinzua December 30, 1952 (Joseph, R. 546). Callner (an employee of Joseph Lumber Company) testified an order for lumber is usually confirmed in a couple of days after an oral order (Callner, R. 2131-3).

[42] In a "conference" telephone call on December 20, 1952 (Joseph, R. 575, Exhibit 433-C), between Joseph, Terman and Needleman, Joseph was quoted as stating O'Donnell had given as an excuse for "passing up the deal" the poor quality of the timber (Exhibit 423). Terman testified that O'Donnell gave his wife's illness as an excuse for "passing up" the deal to Coleman, and the quality of the timber as an ex-

was well aware on December 22, 1952, that O'Donnell had told him in his phone call a few days before that he was not going to pursue Kinzua further.

Everything in this memo was a correct statement of fact as of early January, 1953, and had it borne a date as of that time, it would have been correct. Why then did Joseph cling to his story that it was a memo of a December 19th conversation? We suggest that the reason may be that had Joseph admitted the obvious fact that the date in his memo was erroneous, difficult and embarrassing questions about when, how, and under what circumstances the memo obtained its most peculiar date would have been raised.

3. Exhibit 393—appellant's memo of 12-29-52

This exhibit, purporting to be a memo of a conversation Joseph had with Coleman on December 26, 1952, quotes Coleman as having told Joseph the following:

> "However, he [O'Donnell] said to Coleman, you know I have had several men out here in on this deal with whom I had discussed same, and wanted to know if it was alright with Coleman to turn this deal over to them who might be interested, and Coleman said that he didn't want to discuss the deal with anybody at this time because it was Joseph's deal, and until such time as Joseph told him he had no interest, he didn't care to discuss it with anyone. However, he said that when Joseph told him he was off the deal, he might call him (O'Donnell)."

---

cuse to Joseph, and that this was the subject of some comment (Terman, R. 1251-2, 1361-4). Also, in an actual transcript of a telephone conversation of December 23, 1952, between Casey (one of the sellers' agents) and Gold, there is a discussion at some length of the confusion apparently created by O'Donnell's not giving Joseph and Coleman the same reason for "passing up" the deal (Exhibit 43).

Credible testimony and exhibits in the record demonstrate that this version of Coleman's December 19, 1952, telephone conversation with O'Donnell is false.

It is undisputed that O'Donnell called Coleman on December 19, 1952, and advised him that he (O'Donnell) had determined not to pursue the Kinzua matter (O'Donnell, R. 1777-9; Exhibits 43 and 423). That he did so is clear from this very exhibit of Joseph's.

O'Donnell, apologetic for having taken the Kinzua sellers' agent's time, then asked Coleman as a matter of courtesy whether he would like him (O'Donnell) to bring the fact that Kinzua was for sale to the attention of the Georgia-Pacific Lumber Company with whom he was acquainted through its bankers, Blyth & Company (O'Donnell, R. 1779-81; Exhibit 43). O'Donnell had no financial or other interest in Georgia-Pacific (O'Donnell, R. 1939). Sellers' agent Coleman responded that he would be interested in O'Donnell's referring the matter to Georgia-Pacific (O'Donnell, R. 1781) and O'Donnell thereafter did so (O'Donnell, R. 1782-3, 1938-9).

O'Donnell testified that Coleman did not state during the phone call (or otherwise) that "until such time as Joseph told him he had no interest, he didn't care to discuss it with anyone," nor did he state that it was "Joseph's deal" (O'Donnell, R. 1781). Coleman's deposition, which appellant took but declined to introduce, would give an unprejudiced report of the conversation. Appellant saw fit, however, not to introduce it although invited by appellees to do so (R. 2001-2). Appellant testified that he never communicated with Coleman after

his telephone call of December 26, 1952 (Joseph, R. 531, 644, 497). If appellant had been told by Coleman that he considered Kinzua "Joseph's deal," why did Joseph not contact him when Allyn withdrew in April? Why did he ask Terman to find out the details of the appellee's purchase instead of himself calling Coleman for an explanation? The reason is clear.

4. Exhibit 404—appellant's 3-10-53 dilemma

On March 30, 1953, O'Donnell told Marshall, Allyn's Northwest representative, that he had received a very favorable report from a Mr. Price, a timber engineer, on the timber (O'Donnell, R. 1834-40; Marshall, R. 3354). O'Donnell likewise testified that on the day following he advised Joseph of the favorable Price timber report (O'Donnell, R. 1840-1, 1947-8). Yet Joseph testified at the trial that while O'Donnell called him in late March (at time of deposition, March 10th), he told him that he was then trying to get Price to go into the woods to *cruise* (at time of deposition, "look at") the timber (Joseph, R. 464-5, 608-11; Joseph Dep., R. 2506-7, 2532-3). Appellant would have this court believe that O'Donnell advised Allyn through Marshall (who admittedly was brought into the Kinzua picture by Joseph and with whom, insofar as O'Donnell then knew, Joseph was probably checking from time to time) that Price had been into the woods and that his timber report was favorable, and that on the next day he advised Joseph that he was still trying to get Price to go into the woods! That brings up Joseph's wierd testimony as to Exhibit 404, the memo bearing the date March 10, 1953.

Exhibit 57 is an undated phone call reminder which reported that O'Donnell had called from Seattle, setting forth O'Donnell's Seattle phone number and that of the Seattle operator. On the reverse side of this exhibit (Exhibit 404), are some handwritten notes of Joseph which are dated "3/10/53" and which recite:

> "Conversation had with O'Donnell, returning his call had to do with him waiting for Price . . . to have him go down to Kinzua, and look over operations & timber and said he would contact me later."

At the time of his deposition, Joseph said he must have had a conversation with O'Donnell on 3/10/53, the date of the memo, but that he had no independent recollection of it other than this phone slip (Joseph Dep., R. 2506-7). He further testified that he recalled no conversation with O'Donnell after March 10th (Joseph Dep., R. 2520, 2561) and he was positive O'Donnell had not called him about March 30, 1953 (Joseph Dep., R. 2534-5). However, *at time of trial,* Joseph identified the phone call reminder (Exhibit 57) as a telephone message in the handwriting of his secretary, given to him the "last part of March" (Joseph, R. 468-9, 601). As to the reverse side of the exhibit (Exhibit 404), Joseph was *unable to explain why the "3/10/53" was on the exhibit since he now claimed he recalled the call was in late March,* nor was he able to give any reason for his abrupt change of testimony (Joseph, R. 600-08, 494-5).

It is pointed out that the date "3/10/53" is not a casual one; it is given in paragraph V of plaintiff's complaint and it was the subject of extensive inquiry in the discovery deposition. This exhibit is the basis for Joseph's excuse for his silence from March until late

August after the Kinzua purchase had been concluded. At the time of trial, *contrary to his deposition,* Joseph testified that after his "last part of March" conversation with O'Donnell, he saw no occasion to inquire as O'Donnell had told him Price was making a *cruise* which Joseph thought would take at least 90 days (Joseph, R. 464-7). Joseph was unable to recall when he first thought of this glib explanation (Joseph, R. 608-10). He admitted that Exhibit 404 said nothing about Price making a "cruise" (Joseph, R. 609-10). Joseph knew nothing about cruises—he admitted that he never offered to pay any part of what he thought might be a 90-day program involving an examination of every acre of the 110,000 acres involved (Joseph, R. 611-2). Further, it is noted that Terman's note dated April 23, 1953, crowded into his diary, makes no mention of any "cruise" (Exhibits 406 and 407). It merely quotes Joseph as telephoning two weeks earlier that O'Donnell was "working on deal with Mr. Price and A. C. Allyn man" (Exhibit 407). Terman could recall nothing else (Terman, R. 1268-9).

As part of the Pre-Trial Order, defendants furnished to plaintiff's counsel a list of all exhibits which they intended to use. These included Exhibits 638, 639 and 647 indicating that O'Donnell was playing golf and was at the Racquet Club in Palm Springs on March 10, 1953, that he had not been in Seattle from January 20, 1953, until March 23, 1953, and that he could not have made or received a phone call in Seattle during that period of time. Appellant's counsel had this information approxi-

mately ten days before trial commenced. It is clear that Joseph changed his testimony with respect to his memorandum dated 3/10/53 (Exhibit 404) because he was informed that O'Donnell had absolute proof he was not in Seattle during the time mentioned. Yet Joseph denied that this was the reason but could supply no other (Joseph, R. 606-8).

Could it be, however, that another reason for Joseph's completely new trial version of his last contact with O'Donnell (before learning of Kinzua's purchase in August) was his realization that his story sorely needed basic strengthening? If he conceded that the date of the last telephone call from O'Donnell was substantially contemporaneous with that to Marshall, Allyn's representative, but he then claimed that O'Donnell's report on the status of Price's inspection was different from that given Marshall, a strong inference of duplicity would be raised. In addition, if Price's "look at the timber" were converted into a "cruise of the timber," an explanation, theretofore missing, of his failure to contact O'Donnell, Coleman or Terman and of Terman's failure to contact Joseph or Needleman or Gold for more than four months, would be supplied. Unfortunately for the appellant's case, however, he couldn't change his story without further discrediting both his testimony and his exhibits. And, he could not eliminate or change A. C. Allyn's testimony that he had reported to Joseph in the latter part of April, 1953, his dropping of the Kinzua matter.

Exhibit 404 and appellant's testimony with respect to it are *incredible and untenable.*

5. Appellant's file was "organized" long after the events occurred

Appellant's counsel, on page 44 of Appellant's Opening Brief, says: "Its [Exhibit 404] inadvertent misdating by Joseph is of transcendentally slight importance." Considering

(a) the equally queer date on Exhibits 386, 387, 388 and 389, dated 12-22-52 (making reference to the car of lumber purchased 12-26-52);

(b) the obvious self-serving purpose of Exhibit 393 dated 12-29-52 (the handwritten memorandum reporting what Coleman allegedly told O'Donnell, *i.e.,* this was Joseph's deal);

(c) Joseph's confusion with respect to Exhibits 381, 382 and 391 (his prospecti prepared to interest possible investors);

(d) the notes on the back of the telephone call slip (Exhibit 343) which Joseph testified were made on 11-7-52 setting forth facts about Kinzua which he did not know until the November 19, 1952, Portland meeting; and

(e) the peculiarly dated memo of 3-10-53 (Exhibit 404)

the so-called "inadvertence" becomes a matter of more than idle speculation of "transcendentally slight importance." *There is every indication that Joseph sometime long after the events occurred tried to organize his file.* Whether it was before he turned it over to Terman's attorney, Hoffman, in September, 1953 (Hoffman, R. 1127; Joseph Dep., R. 2291-2), or after Hoffman delivered it to appellant's attorney almost eighteen months later (Hoffman, R. 1120, 1143), is a matter of speculation. When and for what purpose such "organ-

ization'' was undertaken obviously has not and will not be explained by appellant.

VII.

O'Donnell Not Enriched by Reason of Allyn's Replacement by Webster

At page 13 of his brief, appellant states:

> ''While it is not certain, it is quite likely Joseph's loyalty to his duty to Terman was a main reason impelling O'Donnell to his desire to shake out Joseph as the provider of the other 50% of the financing.''

Later in appellant's brief this supposition is several times stated as established fact. Statements such as this point up the difficulty that appellant's attorneys have always had in trying to establish motivation or reason for O'Donnell's claimed ''shaking out'' of Joseph.

But the trial court found that O'Donnell inquired of Joseph after the November 19, 1952, Portland meeting with sellers' agents as to Terman's interest in Kinzua, and was told that Terman was simply a friend of Joseph and of the lawyer for one of Kinzua's stockholders, and that there was no need to worry about him. Joseph did not advise O'Donnell or Chinn, nor did Terman, that Terman was expecting any commission from Kinzua's purchasers or otherwise (O'Donnell, R. 1646-7; Chinn, R. 921-4).

O'Donnell did not, nor did any other of the so-called O'Donnell western group, acquire the interest in Kinzua or any part thereof or profit from such interest or any part thereof which Joseph claims he was entitled to buy or to raise—whatever the latter term covers (Ex-

hibit 114). O'Donnell took only 7% of the transaction and his family corporation 3% for a total investment in the down payment of $334,500 (Exhibit 114). This is less than the interest which he first indicated he might possibly take in Kinzua (O'Donnell, R. 1948; Dunn, R. 1079). Capital Timber Products Company, Webster's company and the "last minute" replacement of Allyn, acquired 50% of the Kinzua purchase (Exhibit 114). As a result, the so-called O'Donnell western group secured less of Kinzua than they intended had Allyn participated as a purchaser (O'Donnell, R. 1552-3).

Since it is clear that O'Donnell did not benefit at Joseph's expense from the claimed "shake out" of Joseph, some other reason had to be urged by appellant. Hence it becomes stated as a fact that O'Donnell from the beginning had been trying to scheme up some way to "shake out" Joseph to avoid his 10% share of Terman's alleged claim to a 5% free ride, a claim which had never been communicated to O'Donnell, Chinn, Coleman or Allyn!

VIII.

If Any Relationship Ever Existed Between Appellant and O'Donnell With Reference to Kinzua, It Was Terminated by March 31, 1953

The trial court concluded from the facts which it found that if any relationship ever existed between Joseph and O'Donnell, it was terminated by March 31, 1953; that Joseph's conduct caused O'Donnell to believe that such relationship, if any, ceased to exist; and that Joseph is estopped to assert a contrary claim (Conclusion of Law VIII, R. 281, App. II, pp. 33-36).

Although appellant makes a broad general statement on page 7 of his brief that his appeal is based " . . . in large measure on the insufficiency of the facts to support the findings, and of the findings to support the judgment that there was no joint venture or *that it was terminated,* or that plaintiff was barred by laches," nowhere in his brief does he argue that the Findings of Fact do not support Conclusion of Law VIII, nor that Conclusion of Law VIII is not alone sufficient to support the Judgment. Appellant's only argument is that Finding of Fact IX(6) (R. 263-264)[43] is not supported by the evidence. His is the simple argument that the trial court erred in believing O'Donnell's testimony rather than Joseph's concerning the telephone conversation between them on March 31, 1953, but that if O'Donnell's testimony were believed, the trial court erred in not construing it as appellant wishes (Appellant's Brief, pp. 54-5).

In the first instance, then, appellant is simply asking

---

[43] Findings of Fact IX(6) annotated to supporting portions of the record is as follows:

"(6) On March 31, 1953 O'Donnell called Joseph in Chicago and told him that Price had made a favorable report with respect to Kinzua's timber and that O'Donnell and others were going to go ahead and look the whole Kinzua deal over (R. 1840-1) and he again indicated that he, the three Wymans and Stuchell each might put a half million in the Kinzua purchase and others not yet talked to probably would make more available (R. 1948). Joseph reiterated that his interest was with the Allyn group and told O'Donnell to do his 'business with Marshall' (R. 1841, 1867-8, 1947-8). No arrangements were made during the conversation or subsequently for further discussions between Joseph and O'Donnell (R. 1841). O'Donnell had reason to believe and did believe that the only interest Joseph then or thereafter had with respect to Kinzua was with the Allyn group exclusively (R. 1867-8, 1882-3), and neither Joseph nor O'Donnell thereafter contacted or attempted to contact each other until after Kinzua's sale to the defendants was completed" (R. 467-8; Pre-Trial Order, Admitted Fact XXIV, R. 159-60).

this Court to substitute its judgment of the credibility of two witnesses' testimony for that of the trial court. This the Court should refuse to do. Nevertheless, respondents welcome the opportunity to demonstrate the soundness of the trial court's determination of this matter.

What was the testimony of O'Donnell upon which Finding of Fact IX(6) is based? He was examined by appellant's counsel respecting the March 31, 1953, telephone conversation during pre-trial discovery (O'Donnell Deposition, R. 3590-2). Again, during the trial, appellant's counsel questioned O'Donnell closely on the matter (O'Donnell, R. 1840-1, 1867-8). Upon cross-examination, O'Donnell's counsel examined him yet again about the conversation (O'Donnell, R. 1947-8). O'Donnell consistently and repeatedly testified that after receiving Price's (a timber engineer) favorable report of his examination of Kinzua timber, O'Donnell called Joseph in Chicago, told him of the report, that he was going to investigate Kinzua further, that he and others in the Northwest could invest at least $2,500,000 in a purchase of Kinzua, that he requested Joseph to confirm that his interest was with the Allyn group, and that Joseph answered that he was with the Allyn group and for O'Donnell to deal with Allyn's Northwest representative.

What was Joseph's testimony concerning the March 31, 1953, telephone conversation? He was closely questioned concerning this matter on three occasions. The first occasion was during pre-trial discovery (Joseph Deposition, R. 2506-12, 2519-20). During the trial his

counsel examined him with reference to it (Joseph, R. 464-5). Again, upon cross-examination, Joseph was asked to reconcile his deposition testimony of the conversation with that given on direct examination at the trial (Joseph, R. 601-8). Joseph's testimony at the trial was that his last contact with O'Donnell occurred on an unknown date in the latter part of March, 1953, by reason of a telephone call from O'Donnell wherein O'Donnell stated that he was trying to get a timber engineer named Price to make an inspection of the Kinzua property and arrange for a cruise. At his counsel's suggestion, Joseph further testified that O'Donnell stated he would let Joseph know when he got a repot on the cruise (Joseph, R. 464-5).

This testimony *contradicted* his previous testimony given during pre-trial discovery. On that occasion, Joseph stated unequivocally and repeatedly that his last conversation with O'Donnell was a telephone conversation, initiated by O'Donnell from Seattle, which occurred on March 10, 1953 (Joseph Deposition, R. 2520). He further testified that he had no independent recollection of the conversation, that a memorandum (Exhibit 404) dated March 10, 1953, was his only basis for testifying that he had any conversation with O'Donnell in March, 1953, and that he remembered nothing which was said which was not stated in the memorandum (Joseph Deposition, R. 2507).

When confronted with this testimony upon cross-examination at the trial, Joseph offered no credible explanation of why he had changed his testimony. In fact, he denied the only apparent explanation which

is that he was informed by his attorney or otherwise, that he couldn't have talked to O'Donnell in Seattle on March 10, 1953, because O'Donnell was not in Seattle on that date (Joseph, R. 601-8). Joseph's denial that he had any recollection of discussing this fact with his attorneys (Joseph, R. 607-8), is prima facie unbelievable; it is more so when no other credible explanation of a change of critically important testimony is made.

Not only did Joseph himself impeach the credibility of his version of the March 31, 1953, telephone conversation, however, much other evidence corroborates O'Donnell's testimony of that conversation.

It is not disputed that Joseph introduced A. C. Allyn to the Kinzua situation on December 30, 1952 (Joseph, R. 554); nor that he requested O'Donnell to give to Allyn all of the information about Kinzua which he possessed; nor that O'Donnell complied with his request (Joseph, R. 453, 557-8); nor that Joseph indicated that he would follow through with Allyn to determine his interest in Kinzua (Joseph, R. 632-4, Exhibits 54 and 55). Neither is there any doubt that on March 30, 1953, O'Donnell called Allyn's Northwest representative and advised him that he had a favorable report upon Kinzua timber from Price (the timber engineer) and that he (O'Donnell) was going to investigate Kinzua further (O'Donnell, R. 1839-40; Marshall, R. 3354). O'Donnell's testimony is that he called Joseph on the following day, told him the same thing, and confirmed that Joseph's interest was with Allyn (O'Donnell, R. 1840-1, 1867-8, 1947-8). Joseph's revised trial testimony is that O'Donnell reported to him that he

was trying to arrange for Price to make an inspection of Kinzua (Joseph, R. 464-5).

It is inconceivable that O'Donnell would make a report to Allyn who was presumably Joseph's friend and associate of many years (Joseph, R. 447-8), and who was supposed to report his Kinzua investigation results to Joseph (Joseph, R. 450-1, 632-4; Exhibits 54 and 55; Allyn, R. 2881-2), and that on the following day, O'Donnell would make a purposeless telephone call to Joseph and tell him something completely inconsistent and contrary. If Joseph's revised testimony were to be believed, appellant's counsel could add the adjectives "naive" and "stupid" to their vituperative assault upon O'Donnell.

Even appellant concedes the incredulity of Joseph's revised testimony of the March 31, 1953, telephone call. However, he argues that "Even on O'Donnell's version of the call, the *necessity* for checking back with Joseph . . . is apparent" (Emphasis supplied) (Appellant's Brief p. 54).

Such "necessity" was not "apparent" to the trial court; nor is it to anyone who critically and objectively reviews all of the evidence. In particular, we respectfully direct attention to the following enumerated Findings of Fact (See Appendix II hereto), and to the portions of the record indicated:

Findings of Fact	*Documentation to Record*
VII (3) (4) (App. 32-33)	Joseph, R. 572-6, 589; Terman, R. 1364; Exhibit 423, R. 1358; and Exhibit 43.
VIII (1) (App. 33)	Joseph, R. 447-9.

Findings of Fact	*Documentation to Record*
VIII (6) (App. 34-35)	Joseph, R. 554-6; O'Donnell, R. 1810-11.
VIII (7), IX (2) (App. 35-36)	Joseph, R. 456, 657-9; Exhibit 52, R. 456; Exhibit 46, R. 657-9.
X (4) (App. 40)	Joseph, R. 496-7, 633-6, 644; Allyn, R. 2875-6.
XI (3) (App. 43-45)	Joseph, R. 468, 473; Exhibit 90, R. 473; Exhibit 93, R. 475.
XI (4) (App. 45-46)	Joseph, R. 652-4, 661, Exhibit 117.

It is most significant that, except for a possible telephone call on January 9, 1953, of which neither Joseph nor O'Donnell have any recollection or memoranda, Joseph did not initiate a contact with O'Donnell, Chinn, Coleman or Casey after he referred Kinzua to Allyn on December 30, 1952, until after Kinzua's purchase in August, 1953. It is likewise most significant that Allyn did not recall any further contact by Joseph after the initial conversation of December 30, 1952 (Allyn, R. 2879-80). Could it be that Joseph lost all interest in Kinzua following his receipt of the January 7, 1953, letter of the LaSalle National Bank which enclosed a banking publication's pessimistic forecast of economic "rough times ahead" in the lumber and plywood industry of the Northwest? (Exhibit 46). Even Joseph's substantially continuous contact with Terman respecting Kinzua virtually terminated following his receipt of Exhibit 46. Indeed, after he forwarded a copy of the sobering forecast to Terman on February 27, 1953 (Joseph, R. 633; Exhibit 122), Mr. Terman's interest also appears to have subsided (Terman, R. 1386-7).

On or shortly following April 27, 1953, Allyn called Joseph and told him that "we were getting out" of Kinzua (Allyn, R. 2875-6; Marshall, R. 3363, 3376-7). Joseph testified that he didn't recall Allyn so advising him, but that he may have done so (Joseph, R. 634). Is it conceivable that anyone with a continuing 50% interest in a multi-million dollar purchase would not recall such a significant and crucial contact? Or, does appellant's counsel suggest that Allyn's testimony is untruthful, too?

Joseph informed no one of Allyn's withdrawal of interest in the purchase of Kinzua. Not O'Donnell or Chinn (Joseph, R. 496-8, 633-6, 644); not Coleman or Casey (Joseph, R. 497-8); not even Terman (Terman, R. 1386-7). If any relationship such as Joseph claims existed between him and O'Donnell on April 27, 1953, would he not have had the obligation and duty to advise O'Donnell of the withdrawal of the only potential investor he had ever disclosed to O'Donnell? Why did he not inform Terman?

It is likewise significant that after Joseph learned of Kinzua's purchase by the respondents, he contacted O'Donnell on only one occasion. That was by letter dated August 31, 1953, four days after he learned of the purchase, in which he stated he "would appreciate your letting me know a little more about it" (Exhibit 90, Joseph, R. 473). O'Donnell replied by letter dated September 22, 1953 (Exhibit 93, Joseph, R. 475). Joseph never answered O'Donnell's letter (Joseph, R. 640) and made no claim of interest in Kinzua until some 20 months later (Exhibit 117, Joseph, R. 652, 654).

These communications and conduct were not those of a person who considered himself to have been wrongfully deprived of a right to 50% of a $12,000,000 purchase.

The substantial evidence in the trial record overwhelmingly supports and confirms Finding of Fact IX (6) of the trial court. It should not be disturbed. Fed. Rules Civ. Proc., Rule 52(a), 28 U.S.C.A. The trial court's Conclusion of Law VIII is likewise adequately supported by that and the other findings of fact above cited.

IX.

Joseph's Claim Is Barred by Speculative Delay and Laches

Appellant, again without attempting to support his position with factual or legal analysis, asserts that the trial court's findings and conclusion of speculative delay and laches are "inappropriate" and "must be swept aside along with the other findings denying the existence of the fiduciary relationship and joint venture and its binding character" (Appellant's Opening Brief, p. 84).

The mandate of Federal Rule 52(a) is that the trial court's findings of fact "shall not be set aside unless clearly erroneous." Fed. Rules Civ. Proc., Rule 52(a), 28 U.S.C.A., 1950 ed. Appellant is apparently familiar with this rule inasmuch as one of his headnotes on p. 84 of his opening brief states that "On the Record on These Issues Which Is Before the Court, the Findings as to Laches, Estoppel, and Speculative Delay Are

Clearly Erroneous." But, he does not thereafter cite a single finding which is not abundantly supported by the trial record!

We respectfully direct the Court's attention to the findings of the trial court, which support its conclusion that appellant is estopped by his speculative delay and barred by his laches to now assert a claim against respondents:

(1) Appellant learned of Kinzua's purchase by respondents on August 27, 1953, ten days following the execution of the purchase documents (Finding of Fact XI(1) and (3), R. 268, App. II, p. 43).

(2) Appellant knew on August 27, 1953, and earlier, that participation in the purchase of Kinzua was highly speculative and fraught with risk (Finding of Fact XIV, R. 275-277, App. II, pp. 50-52).

(3) Appellant knew on August 27, 1953, and earlier, that if Kinzua's purchase price of $12,000,000 was to be economically feasible, substantial changes in corporate structure and organization and in management, operation and production were mandatory, and would require many months to complete, pending which participation in the purchase would be particularly hazardous (Finding of Fact XIV, R. 275-277, App. II, pp. 50-52).

(4) The changes which appellant knew on August 27, 1953, were necessary were, in fact, undertaken and, over a period of many months, completed (Finding of Fact XV, R. 277-279, App. II, pp. 52-55).

(5) Appellant had received an extremely pessimistic report from his Chicago bank in January, 1953, concerning economic prospects of the lumber and plywood business of the Pacific Northwest and

appellant knew that the prices of timber stumpage and lumber products were declining in the winter, spring and summer of 1953 and that the lumber industry was in a depressed condition (Findings of Fact VIII (7), R. 261, App. II, pp. 35-36; XIII (7), R. 275, App. II, p. 50; XVI, R. 279-280, App. II, p. 55).

(6) Appellant knew that prices of timber stumpage and lumber products had materially increased during 1954 and 1955, and he believed in May, 1955, that the Kinzua investment had been highly successful (Finding of Fact XVI, R. 279-280, App. II, p. 55).

(7) Appellant learned of the names of all of the purchasers of Kinzua on or before August 27, 1953, but did not make any demand upon any of them, nor suggest that he had a claim, until May, 1955, more than twenty months later (Findings of Fact XI (3) and (4), R. 268, 270, App. II, pp. 43-46).

(8) Appellant's only communication with O'Donnell after he learned of Kinzua's purchase was a letter dated August 31, 1953, which contained no hint of a claim or demand (Finding of Fact XI (3), R. 268-269, App. II, pp. 43-45). Appellant did not reply to O'Donnell's September 22, 1953, response to said letter (Finding of Fact XI (4), R. 270, App. II, pp. 45-46).

Each of these findings is set forth in Appendix II hereto, and each is documented in detail by references to specific evidence in the trial record. The trial court concluded from these findings that the plaintiff had been guilty of speculative delay and laches.[44]

---

[44] Conclusion of Law IX, R. 282: "IX. Plaintiff speculatively delayed asserting any claim against defendant O'Donnell or any of the other defendants during the period of the greatest hazard to defendants' invest-

The doctrine of laches as applied in the state courts of the State of Washington is the law to be applied in this case (By Stipulation, Preamble to Findings of Fact and Conclusions of Law, R. 245).

The doctrine of laches followed in the State of Washington is in accord with that developed by federal courts of equity. In *Ferrell v. Lord,* 1906, 43 Wash. 667, 86 Pac. 1060, the court stated at 1062:

> "There is no inflexible rule controlling the application of the defense of laches. The facts and circumstances of each case must govern courts of equity in permitting said defense to be made. The authorities show that, while lapse of time is one of the elements to be considered in applying this equitable defense to stale claims, it is only one, and that it is not necessarily the controlling or most important one. Regard must be had to all the facts and surrounding circumstances. . . ."

The court thereafter quoted with approval from the United States Supreme Court opinions of *Hayward v. National Bank,* 1878, 96 U.S. 611, 617, 618, 24 L.ed. 855; *Townsend v. Vanderwerker,* 1895, 160 U.S. 171, 186, 40 L.ed. 383, and *Patterson v. Hewitt,* 1904, 195 U.S. 309, 49 L.ed. 214, wherein the broad general principles of the doctrine of laches are discussed.

See also: *Edison Oyster Company v. Pioneer Oyster Company et al.,* 1945, 22 Wn.2d 616, 628, 157 P.2d 302.

The tests which the courts of the State of Washington apply in determining the existence or non-exist-

---

ment and until the success thereof appeared to him to be certain. Plaintiff is barred by laches and he is estopped from asserting any claim against defendant O'Donnell or any other defendant."

ence of laches, no one of which is controlling, are the following:

A. Lapse of Time

The Supreme Court of the State of Washington, in *Ferrell v. Lord,* 1906, 43 Wash. 667, 86 Pac. 1060, quotes with approval from *Townsend v. Vanderwerker,* 1895, 160 U.S. 171, 186, 40 L.ed. 383, as follows at 1063:

> "The question of laches does not depend, as does the statute of limitations, upon the fact that *a* certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did."

Also quoted at length in *Ferrell v. Lord, supra,* is the United States Supreme Court case of *Patterson v. Hewitt,* 1904, 195 U.S. 309, 49 L.ed. 214. In the last-cited case, Mr. Justice Brown, in a portion of his opinion which is not quoted by the Washington court, states at p. 319:

> "Indeed, in some cases the diligence required is measured by months rather than by years."

In *Bacon v. Neill,* 9 Cir. 1922, 283 Fed. 717 (on appeal from the United States District Court for the Eastern District of Washington) the defendant acquired the property with respect to which the plaintiff claimed a right and interest in March, 1917. Plaintiff, some two years and nine months later, commenced his action to establish such rights. Despite the fact that the time prescribed by the analogous statute of limitation barring an action at law had not expired, the

court found that plaintiff had delayed too long in asserting his rights and that relief in equity was barred by his laches.

The Supreme Court of Washington, in *Stewart et al. v. Johnston et al.*, 1948, 30 Wn.2d 925, 195 P.2d 119, discussing lapse of time as an element of laches, adopts the following language at p. 125:

> " 'A court of equity moves upon consideration of conscience, good faith and reasonable diligence. Knowlege and unreasonable delay are essential elements of the defense of laches. The precise time that may elapse between the act complained of as wrongful and the bringing of suit to prevent or correct the wrong does not, in itself, determine the question of laches. What constitutes unreasonable delay is a question of fact dependent largely upon the particular circumstances. No rigid rule has ever been laid down. Change of position on the the part of those affected by nonaction, and the intervention of rights are factors of supreme importance. . . .' *Federal United Corp v. Havender,* 17 Del. App. Ch. 318, 435, 11 A.2d 331, 343.
>
> "In the case last quoted, there is an enumeration of instances in which delays of from one to ten months have been held to constitute laches."

B. Nature of the Subject Matter and Its Propensity Toward Fluctuation in Value

It is well established that a court of equity will not countenance speculative delay; it will not permit the claimant to lie back and wait to see whether the venture is to be profitable before asserting his claim. This is particularly true where the nature of the property is such that fluctuation of value is likely. In the widely

cited case of *Twin-Lick Oil Co. v. Marbury,* 1875, 91 U.S. 587, 23 L.ed. 328, Mr. Justice Miller stated (pp. 592-593):

> "No delay for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably to himself whether he will abide by his bargain, or rescind it, is allowed in a court of equity.
>
> . . . . .
>
> "The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands today is worth nothing tomorrow; and that which would today sell for a thousand dollars as its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit.
>
> "While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent, and violent fluctuations in value of any thing known as property, requires prompt action in all who hold an option, whether they will share its risks, or stand clear of them."

Cf. *Curtis et al. v. Lakin et al.,* 8 Cir. 1899, 94 Fed. 251; *Taylor v. Salt Creek Consolidated Oil Company et al.,* 8 Cir. 1922, 285 Fed. 532.

The doctrine of speculative delay was approved and followed in the case of *Robinson v. Linfield College,* E.D. Wash. 1941, 42 F.Supp. 147, aff'd. 136 F.2d 805.

C. Change of Position by Appellees

Courts of equity will not grant their extraordinary relief to one who has delayed assertion of his claim, especially where the delay has led to a change of conditions or the other party has innocently altered his position with respect to the subject matter. Cf. *Hays v. Port of Seattle, et al.,* 1920, 251 U.S. 233, 64 L.ed. 243; *Lavigne v. Hughes,* 1939, 199 Wash. 285, 91 P.2d 560; *Chezum v. McBride et al,* 1899, 21 Wash. 558, 58 Pac. 1067.

In view of the facts of the instant case, the language of the California court in the case of *Livermore v. Beal,* 1937, 18 Cal. App.2d 535, 64 P.2d 987, at page 995, is peculiarly applicable:

> "Or, in other words, one is not permitted to stand by while another develops property in which he claims an interest, and then, if the property proves valuable, assert a claim thereto, and, if it does not prove valuable, be willing that the losses incurred in the exploration be borne by the opposite party. This thought was expressed in one case by the following language: 'If the property proves good, I want it; if it is valueless, you keep it'."

A similar statement of the applicable rule appears in *Wright et al. v. Tacoma Gas & Electric Light Co. et al.,* 1909, 53 Wash. 262, 265, 101 Pac. 865, where it was said:

> "This action was brought on December 13, 1906, six months after the action complained of. It is

the law of this state that the statute of limitations cannot be relied upon in a case of this kind, but that parties who are seeking equitable relief must proceed within a reasonable time. It is also established by the law generally that the right of a dissenting stockholder may be lost by laches. 2 Cook, Stockholders (3d ed.) par. 733. It is also stated, in the same authority:

" 'If it is evident that the stockholder is waiting to see whether the unauthorized act would be profitable to the corporation, the court will refuse to grant him any relief. So, also, if the stockholder, after a full knowledge of the facts, stands by and allows large operations to be completed or money expended or alterations to be made before he brings suit, he is guilty of laches, and his remedy is barred'."

Expenditures and improvements by defendants constitute a sufficient change of position to warrant the application of the doctrine of laches. *Chezum v. McBride,* 1899, 21 Wash. 285, 58 Pac. 1067. The rule is stated in 19 Am. Jur., Equity, §512, pp. 355-356, as follows:

"Proof of this factor consists frequently in evidence showing the expenditure of money or the incurring of obligations by the defendant in the belief that he had a clear or unencumbered right. The bill will be dismissed where it appears that the complainant stood by and permitted the defendant to expend sums of money in improving the property."

D. Apparent Acquiescence by Appellant

De Boe v. Prentice Packing & Storage Co., 1933, 172 Wash. 514, 20 P.2d 1107, contains a comprehensive analysis by the Washington court of what constitutes

acquiescence. The court there approves the general rule regarding this factor, stating at page 1110:

> " 'The term "acquiescence" is sometimes used improperly. It differs from confirmation on the one side, and from mere delay on the other. While confirmation implies a deliberate act, intended to renew and ratify a transaction known to be voidable, acquiescence is some act, not deliberately intended to ratify a former transaction known to be voidable, but recognizing the transaction as existing, and intended, in some extent at least, to carry it into effect, and to obtain or claim the benefits resulting from it. . . . As acquiescence is thus a recognition of and consent to the contract or other transaction as existing, the requisites to its being effective as a bar are, knowledge or notice of the transaction itself, knowledge of the party's own rights, absence of all undue influence or restraint, and consequent freedom of action; . . . When a party with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity.' 2 Pomeroy's Equity Jurisprudence, §965."

Applying these tests to the facts of this case, and, in particular, to those above outlined, the correctness

of the trial court's Conclusion of Law IX is clear. That appellant recognizes this is attested by his abortive attempt to shift the responsibility for his long delay to his friend and associate Sol A. Hoffman (Joseph, R. 480-1; Appellant's Opening Brief p. 85). Mr. Hoffman, however, repudiated appellant's efforts; although he acknowledged that appellant's file on Kinzua was in his possession from September, 1953, until the early months of 1955, he stated that it was referred to him as attorney for Mr. Terman, and that he had not represented appellant as his attorney in this matter (Hoffman, R. 1141-44). Thus, appellant's delay in asserting his claim was not due to a lawyer's procrastination, as argued, but to the speculative delay which the trial court found.

We concur in appellant's statement that the elements of laches, estoppel and speculative delay must be proved and are not presumed to exist. We submit such proof is manifest in the trial record.

X.

Credibility—A Comparison of Appellant and O'Donnell

A. Appellant's Attorney Continued to Scurrilously Vilify and Abuse O'Donnell

Appellant, in his opening brief continues, as before the trial judge, to vilify and abuse O'Donnell.

Although appellees do not intend to wallow in appellant's trough, they feel that designed scurrilous mudslinging at integrity and character should not go uncalled, and should be identified as such. With unwritten appropriate adjectives interpolated and falling in place as they may and with endeavored restraint, appellees

have heretofore and do hereafter discuss a number of phases of the evidence bearing on relative credibility. To discuss all of the many, many phases of Joseph's and Terman's evidence casting doubt upon their over-all credibility is not possible within reasonable space limitations.

The trial judge, who observed Joseph as a witness during 4 days of testimony, O'Donnell as a witness for a like period, and Terman for 2 days, and who considered this matter over a period of months, could best judge the credibility of these parties. In his oral decision, he said in part,

> *"I cannot subscribe to the castigation of Mr. O'Donnell's character and of his testimony that counsel for the plaintiff have given in their briefs and argument, . . . I just can['t] agree with their view, and I don't agre[e] with it. I must say that Mr. O'Donnell impressed me most favorably."* (R. 4249; Emphasis supplied)

And later, with respect to Joseph's claim of an agreement made on November 18, 1952, with O'Donnell in Portland, the court said:

> *". . . I don't believe it . . ."* (R. 4257; Emphasis supplied)

and with respect to conduct giving rise to the implication of a legally binding contract for a joint purchase of Kinzua,

> "I have looked the evidence over from stem to stern and I can't find it." (R. 4257)

and further with respect to Joseph's claim of a joint venture,

> *"I simply cannot believe and accept the* [Joseph's] *story."* (R. 4259; Emphasis supplied)

and,

> "If you add to that five months' silence and inaction the next following circumstance, astonishment and incredulity increase." (R. 4260)

Commenting upon Joseph's silence and inaction before the purchase by O'Donnell and others and his 20-month delay in asserting any claim after learning of the purchase, the trial court said:

> "Either circumstance standing alone would throw the gravest doubt on Joseph's claim of joint venture; the two together make *the claim incredible and untenable."* (R. 4261; Emphasis supplied)

1. Nature of appellant's abortive attack on O'Donnell

Thwarted as they are in establishing a contract of joint venture between Joseph and O'Donnell, appellant's counsel attempt to establish a case by villifying O'Donnell. It is too obvious to require comment that appellant cannot sustain the burden of proof by calling another a liar. But even in villifying O'Donnell, counsel grasp at straws that do not exist. By drawing their own false inferences from O'Donnell's testimony, they create their own straw men to destroy. Then, after destroying their own inferences, they confusedly urge that they have destroyed the testimony which they themselves falsely interpreted. But, of course, they do no more than to destroy their own creature. The testimony as given stands unimpeached.

For example, on page 69 of their brief, counsel say in effect that O'Donnell dishonestly quibbles by testifying that he did not tell Joseph that Kinzua's timber would

sell for $40 per M, but only that it would *appraise* at that figure. Counsel then infer, that:

> "(Clearly, O'Donnell at trial wanted to make it seem that the profit would be small, and that he had given Joseph little information which in any case Joseph misinterpreted)."

This is counsel's own inference—certainly not O'Donnell's. And it is an oblique way of saying that in counsel's opinion O'Donnell was dishonest.

O'Donnell's testimony, however, is clearly understandable. He contemplated a situation where Kinzua's timber would be owned by individuals who in turn would sell to a sawmill corporation which the individuals themselves controlled. To establish for tax purposes the fairness of the controlled sale would require an independent appraisal of the timber. O'Donnell knew this, but probably Joseph and Kelleher did not. Hence, O'Donnell naturally thought in terms of appraisal; while Joseph and Kelleher probably thought in terms of sale. In this situation the same words could easily be interpreted differently by different persons depending upon their point of view. But despite the difference in interpretation the substance is the same; for the appraised value and sale value should be substantially equal. And since the entire matter is so remote from the actual issues involved in this case, it is mere trivia. Certainly it is an insufficient basis upon which to call O'Donnell a liar.

Again on page 69 of their brief, counsel infer that O'Donnell was dishonest when he testified (O'Donnell, R. 1920) that appellees "put up" $800,000 for improve-

ments to the Kinzua properties. There is no doubt the moneys were expended—but they were expended from funds which were acquired directly or indirectly from Kinzua's purchase (R. 1933-4). Because they were expended from this source rather than from advances from other sources, counsel imply that O'Donnell was dishonest and that "pressure of documentation drove O'Donnell grudgingly and reluctantly toward the truth" (Appellant's Opening Brief, p. 70). Here again, counsel build their own straw man to destroy. They *infer* O'Donnell testified that the funds came from other sources. He did not. He testified the funds came from "an account that all of the individual owners [appellees] maintained to service the loan" (O'Donnell, R. 1920). It is counsel's *inference* that the funds came from other sources, and it is their own inference they destroy—not O'Donnell's. Proving inferences falsely drawn from testimony to be false does not prove either that the testimony is false or the witness a liar. It proves only that the inference falsely drawn is false.

Appellant's counsel discuss O'Donnell's relationship with Kelleher. What that has to do with establishing a joint venture between Joseph and O'Donnell certainly is not clear. But apparently counsel assume that O'Donnell wrongfully deprived Kelleher of a commission or fee, and then infer that because he did so, he "shook Joseph out" of the Kinzua deal to avoid paying Terman a finder's or broker's fee. Not only is the analogy between Kelleher and Terman unclear, but documentary evidence demonstrates that O'Donnell did not wrongfully deprive Kelleher of a fee (Exhibits 71, 74, 100 and 101).

A brief statement of the facts concerning the Kelleher incident should dispel the inferences which appellant seeks to draw from it. O'Donnell was aware of the fact that Kelleher was employed by Webster to find business transactions for him. When O'Donnell resolved to contact Webster following Allyn's drop-out on April 27, 1952, he called Kelleher for this purpose. Kelleher sought information from O'Donnell which he thereafter presented to Webster. Kelleher first informed O'Donnell by wire on May 18, 1953, that he claimed a commission in the Kinzua matter (Exhibit 71). On the following day, May 19, 1953, O'Donnell wired Kelleher that he didn't realize Kelleher "claimed to have any position other than as agent" for Webster, and that he (O'Donnell) would not recognize Kelleher's claim (Exhibit 74). Webster eventually settled Kelleher's claim in connection with Kinzua together with many others, all as set forth in Exhibits 100 and 101. O'Donnell had nothing to do with this settlement and did not contribute to it (O'Donnell, R. 1543-5).

B. Order in Which Depositions Were Taken

O'Donnell's and Chinn's depositions covering matters that occurred more than two years before the time Joseph apprised them of any claimed position with respect to Kinzua, were each taken in late September, 1955, several weeks before that of Joseph. Chinn's deposition was interrupted in the course of appellant's examination and was not completed. O'Donnell's deposition also was continued and appellees' counsel had no opportunity to question either O'Donnell or Chinn to straighten out any matters or to refresh their recollection (Chinn

dep., R. 3213, *et seq.;* O'Donnell Dep., R. 3386, *et seq.*). O'Donnell and Chinn submitted corrections to their depositions almost a year after the depositions were taken and when other testimony and evidence was available for the purpose of refreshing recollections.

As contrasted with the above, appellant admitted at the time of his deposition that he had seen O'Donnell's and Chinn's depositions (Joseph Dep., R. 2238-9), and that Terman had also made available to him his voluminous notes (Joseph Dep., R. 2288-91). Typically, on pages 175-7 of his deposition appellant admitted that his recollection wasn't very good and he was relying upon Terman's notes (Joseph Dep., R. 2288-90). Terman came all the way back to Chicago just before Joseph's deposition, bringing his voluminous notes and spent several days there with Mr. Todd, one of appellant's attorneys, and appellant preparing for appellant's testimony (Joseph Dep., R. 2290-1). Appellant also had available for the purpose of refreshing his recollection his own file (Joseph Dep., R. 2291). Appellant's deposition was completed in the sense that it was continued only for a very limited purpose (Joseph Dep., R. 2638), and his counsel asked him questions and clarified matters (Joseph Dep., R. 2606-24, 2635-6). Appellant changed his testimony many times on crucial matters at the forcing and suggestion of appellees' attorneys examining him. He corrected his deposition within a short time after it was taken. Nevertheless, as pointed out repeatedly herein, his testimony at the trial on crucial matters varied materially from his deposition.

C. Appellant's Testimony Did But O'Donnell's Did Not Vary in Important Aspects from His Deposition

O'Donnell's and Chinn's testimony at trial was substantially the same in all material respects as at the time of deposition. The only changes made by O'Donnell or Chinn of any moment were changes occasioned (a) by the fact that after being shown a carbon copy of the letter in Joseph's file directed to O'Donnell at Palm Springs in February, 1953, O'Donnell recalled seeing the enclosure referred to in that letter (an excerpt from a banker's report of the depressed conditions in the lumber market) and he ascertained that he had made the phone call from Los Angeles to Chicago referred to in Joseph's letter, and (b) after his deposition, O'Donnell recalled being in the University Club of Portland on one occasion with Joseph which must have been November 18, 1952, the only evening that he saw Joseph, and he had a vague recollection of seeing Joseph in the hotel lobby when he arrived in Portland (O'Donnell, R. 1620-4).

O'Donnell and Chinn each testified that he had been in Portland many times, and at the University Club in Portland many times, contrasted with the fact that this was the first visit of Joseph to Portland. This explains certainly in part why O'Donnell did not remember the exact time and place of first seeing Joseph in Portland. It does not follow that O'Donnell and Chinn would not have recalled the occurrence of any important conversation.

Appellant himself was certainly at least confused on the time sequence (Exhibit 97). On June 23, 1954, ap-

pellant wrote to Lee Olwell, a Seattle attorney investigating the possibility of a claim by Terman for a broker's commission, [45] stating that "After the meeting" (with Coleman and Casey on November 19) he walked with Chinn and O'Donnell to Chinn's Club (the University Club) during which Terman's commission was allegedly discussed (Exhibit 97). Prior to the time of the taking of his deposition appellant knew (a) that the registrations at the Heathman Hotel in Portland showed that O'Donnell checked out about noon on November 19th and also gave the arrival times and the room numbers for Joseph, O'Donnell and Chinn (Joseph Dep., R. 2306-7), and (b) that O'Donnell and Chinn placed all relevant conversation after the meeting with Coleman and Casey (Joseph Dep., R. 2238-9). Without this information, it is submitted that appellant would have testified in accordance with his letter to Olwell (Exhibit 97), his only prior written record of recollection. Appellees wonder just what appellant's testimony as to the time sequence of his alleged agreement with O'Donnell would have been had his deposition been taken first, or had O'Donnell and Chinn remembered meeting Joseph the evening of November 18, 1952.

If appellant had corrected his deposition to conform to his testimony at trial, there would have been little of the important elements of his original testimony left, and this in spite of appellant's great advantage over O'Donnell and Chinn at the time of the taking of his deposition!

[45] Incidentally, but perhaps not insignificantly, Joseph's eventual choice of Seattle lawyers are also listed as possibilities for Terman (Exhibit 551)—Was Terman's claim also presented to them in the first instance?

D. Illustrations of the Many Variances in Appellant's Testimony

It would unduly extend this phase of the brief to point up all of the many discrepancies evident between appellant's deposition and his trial testimony. Many of these discrepancies have heretofore been mentioned, such as

1. The strange metamorphosis in appellant's testimony concerning the document prepared in mid-December to interest investors (Exhibits 381, 382 and 391). As mentioned at pages 105 to 109 hereof, it first appears that appellant thought these were notes he had in his possession before he met with Coleman, Casey, O'Donnell and Chinn in Portland on November 19th. Then he thought they were the notes of the meeting of November 19th. Only after many questions pointing it up, did he finally come to the conclusion that they were prepared in December to interest investors, and that the information in large part came from O'Donnell. Even then he had the time sequence mixed up in that he thought the first one was the one not making any reference to a Western group and the timber being examined, and that the one making such reference was the second. Later, after being further educated, he switched the time sequence around.
2. Appellant's shifting testimony with respect to the required down payment at the November 19, 1952, Portland meeting is set forth at pages 109 to 110 hereof.
3. Appellant's four versions in his testimony of his "if it looks good to ourselves," "take 50%," or "raise half the money," story is hereafter outlined at pages 152 to 162 hereof.
4. Appellant's testimony concerning his strangely

dated December 22, 1952, memo (Exhibits 386, 387, 388 and 389), the one in which he refers as an accomplished fact to the ordering of a car of lumber which was not ordered until four days later, is set forth at pages 110 to 112 hereof. It was this memo that he first testified he wrote out in longhand because his secretary was not good at dictation, that she then typed it, and he destroyed the notes. At trial, however, he was positive he had dictated it to his secretary directly and that there were no notes.

5. At pages 114 to 117 hereof, we have commented upon the remarkable alterations in appellant's testimony concerning Exhibit 404 (the alleged memo of a March telephone conversation with O'Donnell), including appellant's newly-discovered "cruise" story and his testimony that the conversation reported under the date of 3-10-53 was in late March rather than March 10th, just because "it suddenly came to him."

A few more of the adjustments in appellant's testimony between the time of deposition and trial are reflected in the following:

6. Appellant at the time of his deposition testified positively that he told Allyn about O'Donnell, but he was not certain that he told him about Munger (Joseph Dep., R. 2471-2). At the time of trial he was positive he had told him of Munger, but not positive about O'Donnell (Joseph, R. 623). The variance was unquestionably due to Allyn's testimony given subsequent to appellant's deposition that O'Donnell positively was not mentioned by appellant, but that Munger was (Allyn, R. 2873, 2877).

7. At the time of trial, appellant testified that on November 18, 1952, he told O'Donnell that he, appellant, "was told that this was to be kept confidential"

(Joseph, R. 373). At the time of deposition, he testified to the contrary that he did not tell O'Donnell that the information was confidential (Joseph Dep., R. 2597).

8. At the time of trial, appellant testified that O'Donnell assented to the joint venture proposal which he claims he made to O'Donnell on November 18, 1952 (Joseph, R. 594-5). He did not so testify in his deposition (Joseph Dep., R. 2311-12).

We have heretofore commented upon the memo-making capacities of witness Terman and his direct interest in the lawsuit at pages 69 to 73 hereof.

E. Appellant's Unwillingness to Introduce Coleman's Deposition

Appellant took the depositions of Coleman and Casey, the two Kinzua selling agents with whom Joseph, O'Donnell, Chinn and Allyn's representative Marshall had their dealings, and said depositions lay in the Clerk's office during the trial of this case. However, even though at the close of appellant's case before the trial court, counsel for O'Donnell called appellant's counsel's attention to the fact that the deposition of Coleman had not been introduced, appellant's counsel declined to introduce Coleman's deposition and objected to plaintiff's offer to do so (R. 2001-2). The inference to be drawn is clear.[46] Among matters Coleman could shed light on are: Coleman was a fellow director of Kinzua with Terman's friends Needleman and Gold;

---

[46] 20 Am. Jur., Evidence, §183, p. 188, §187, p. 192; *Coyle Lines, Inc., v. U. S.*, 5 Cir. 1952, 195 F.2d 737; *Interstate Circuit, Inc., v. U. S.*, 1938, 306 U.S. 208, 59 S.Ct. 467, 83 L.ed. 610; *Bengston v. Shain*, 1953, 42 Wn.(2d) 404, 255 P.2d 892.

Coleman was present at the meeting of November 19, 1952, when Joseph indicated only a small possible investment; Coleman was quoted by Joseph as saying that this was Joseph's deal, refusing to grant O'Donnell permission to interest others when he lost interest; Coleman would be aware of whether the car of lumber purchased by appellant was ordered on December 19, 1952, as appellant's December 22, 1952, memo states (Exhibit 387), or on December 26, 1952, as the evidence otherwise shows. Coleman was the leading agent engaged in selling Kinzua, yet appellant did not see fit to introduce his deposition, or that of Casey, Coleman's attorney. That both witnesses would testify adversely to appellant on material issues is to be inferred.

F. Appellant Can't Add—Three 50%s Equal 150% of a Deal

The specious nature of Joseph's claim is pointed up by Joseph and his own counsel. Joseph claims he and a Chicago group of investors intended to invest 50% of Kinzua's purchase price, although he testified that he did not so advise O'Donnell (Joseph, R. 555-6). When O'Donnell withdrew on December 19, 1952, Joseph contacted A. C. Allyn, an investment banking firm in Chicago, on December 30th (Joseph, R. 448; Allyn, R. 2871). Joseph's counsel say, on pages 15 and 16 of their brief, that the purpose of the call to Allyn was to obtain a substitute for O'Donnell's 50% interest. But Joseph did not so advise Allyn, nor did Joseph tell him that Joseph and others had "committed" themselves for $3,100,000 for Kinzua's purchase (Joseph, R. 551; Allyn,

R. 2877-8). Allyn thought Joseph was a curbstone broker seeking a finder's fee (Allyn, R. 2879).

On January 5, 1952, when O'Donnell became somewhat reinterested, O'Donnell told Joseph that he and other Seattle people could raise $2,500,000 of Kinzua's purchase if subsequent investigation proved its desirability (O'Donnell, R. 1810-11). Joseph told O'Dónnell to cooperate with Allyn (Joseph, R. 451-2), but did not tell him that Joseph and others had raised $3,-100,000. If then Joseph was to take 50% of Kinzua's purchase, and Allyn was to take 50% and O'Donnell was to take 50%, there were too many per cents by 50%, *plus* whatever Joseph believed Terman's percentage was to be.

It is not too much to expect that if Joseph was a joint venturer with O'Donnell he would have advised O'Donnell that he had raised $3,100,000 if in fact it had been raised. Contrariwise, if the money was raised, his withholding that information is an indication that he did not consider that he and O'Donnell were joint adventurers. In any event, Joseph was the only one of the three, *i.e.,* himself, Allyn and O'Donnell, who knew Joseph had raised $3,100,000, if it was raised. Fair dealing would require Joseph to clarify to Allyn and O'Donnell the strange story of 150% of a 100% deal. From his failure to do so, it is to be inferred either (1) that he was duplicious or (2) that he considered himself unbound by a joint venture relationship with O'Donnell, or any other. The explanation of this strange state of affairs clearly rests with Joseph, not only because he has the burden of proof, but because the situation, if it

existed, was of his own creation. Our own explanation is that appellant's counsel is caught in the web of proving that which is simply nonexistent.

XI

Even Under Appellant's Version of the Facts, No Contract of Joint Venture Existed Between Him and O'Donnell

A. Counsel's Claimed Contract Is Based Upon False Assumptions and Specious Inferences Drawn Therefrom

In making its findings of fact the trial court found that O'Donnell was a completely trustworthy witness; and the record, objectively read, fully supports the trial court's finding. In this portion of the brief, however, we assume, arguendo, the truth of Joseph's version of the events occurring during their November 18 and 19, 1952, meetings in Portland and subsequently. *Even under his version of the facts no contract of joint venture was created between himself and O'Donnell.*

On page 12 of appellant's opening brief, his counsel say:

> "They agreed specifically and affirmatively that Joseph and O'Donnell, for themselves and groups headed by each of them in Chicago and Seattle respectively, should, as equal joint venturers negotiate for and consummate the purchase of Kinzua on whatever suitable purchase basis could be arranged."

There is not one single shred of testimony, even of Joseph's, demonstrating that Joseph and O'Donnell agreed "specifically and affirmatively" to anything. The foregoing statement is at the very most a *conclusion of counsel* based upon their own assumptions and

inferences. This they themselves virtually recognize. For on page 27 of their opening brief, they say:

> "The *assumption* would be far-fetched that two experienced businessmen such as Joseph and O'Donnell would go to an important meeting, flying hundreds of miles to do so, and start negotiations with the authorized representative of the sellers for purchase of a timber empire, without first having arrived at some understanding as to their relations as between themselves." (Emphasis supplied.)

And again on page 29 of their brief, they say:

> "That there was conversation that evening is plain. That it *must* have borne a relationship to the only reason they came to Portland—to enter into negotiations for the purchase of Kinzua—is also plain. The denial of Chinn and O'Donnell is inherently incredible." (Emphasis supplied.)

That this is piling assumption upon assumption and inference upon inference is easily demonstrated:

1. From the fact that Joseph and O'Donnell flew "hundreds of miles" to Portland, counsel *infer* that they must have intended to enter into negotiations for Kinzua's purchase;
2. *Assuming* then as fact that the parties came to Portland "to negotiate," counsel *infer* that they must have discussed their relationship with each other as purchasers;
3. *Assuming* then as fact that they discussed their relationship, counsel *infer* that they must have reached an agreement with respect thereto; and
4. *Assuming* then as fact that they reached an agreement, counsel *infer* the agreement was that above set forth.

The foregoing assumptions are false. Joseph did not fly from Chicago to the West Coast solely to attend, as counsel imply, an important meeting. He was, *in fact,* on his way to his winter vacation in La Quinta, California (Joseph, R. 520-1). The so-called Portland meetings were simply a delay en route.

Moreover, experienced businessmen do not negotiate until they have first determined that negotiations are feasible, practicable and desirable. This requires knowledge of what is for sale and some basis of its acquisition. But under Joseph's testimony, he and O'Donnell were ignorant of either. At the time of the so-called meeting in Portland on November 18, 1952, actually consisting of a drink, dinner at the University Club and attendance at a night club thereafter (Joseph, R. 372-374), Joseph testified he was "unable to discuss the statistics of the deal as to price" because he had only "a sketchy outline of the deal" (Joseph, R. 374-5; *cf.,* 563). Joseph had asked Terman to obtain information about Kinzua from Needleman (Exhibits 4, 5, 361). Needleman, however, had refused to supply it because he considered it to be confidential (Needleman, R. 2763-4). Joseph also testified that he had sought information from Coleman, one of Kinzua's sales representatives, by long distance telephone, but Coleman had refused to supply it (Joseph, R. 356, 362). Even on November 19th, *the day after* counsel's "agreement" was supposed to have been created, Kinzua's sales representatives supplied insufficient data upon which to determine whether negotiations were feasible or desirable. Those representatives, as Joseph himself testified, withheld cruise data

and operating and financial statements pending deposit of $600,000, which Joseph's counsel do not claim was even considered by Joseph (Joseph, R. 377).

Further, it is not the usual thing for experienced businessmen to assume the fiduciary obligations of joint adventurers with utter and complete strangers, particularly in a transaction of the magnitude of Kinzua's acquisition. In this case, not only were Joseph and O'Donnell strangers to each other (Joseph, R. 371), but Kinzua's acquisition necessarily required the assistance of others unknown and unnamed. Only in the most unusual circumstances could it be inferred that conversations between utter strangers could result in the formation of a contract of joint venture to negotiate for and acquire a multi-million dollar property requiring the assistance of others unnamed and unascertainable.

Counsel's inferences are erroneous. Joseph and O'Donnell did not come to Portland to "enter into negotiations for the purchase of Kinzua"; they came to Portland to find out *what* was for sale and *how* it could be acquired. They were not yet in a position to discuss co-adventurers. It was necessary to determine *whether* Kinzua's acquisition was desirable and feasible *before* they could determine *if* they wanted to negotiate, and *how* they wanted to negotiate.

It is clear from Joseph's own testimony that a decision "to negotiate" was not made even on Nov. 19, the day *after* Joseph's counsel claim he and O'Donnell "specifically and affirmatively agreed . . . [to] negotiate for and consummate the purchase of Kinzua. . . . " Thus Joseph testified that the following conversation

took place following the meeting with Kinzua's representatives on November 19 (Joseph, R. 380):

> ". . . and the few minutes we had, he [O'Donnell] said, 'Well, what this fellow has told us about all the timber they have got and what they have got out there looks like he might have something. I want to make some investigation about this thing, Joseph,' so I said, to O'Donnell, 'Well, now, you are in a hurry to get away. What do you want me to do, go back home and start get going on the financing of this thing?' He said, '*No, let me handle it. Let me do some checking on this thing, and let me talk to my bankers and see what I can find out about it.*' It was a very, very few minutes that I had to talk with O'Donnell, and he was off to get his plane." (Emphasis added.)

The italicized words disprove counsel's claimed agreement. They were not words of commitment and agreement; and they are not promises. They are not even words of prophecy or expressions of future intentions. They are words of caution. If the words were uttered at all, they are a simple forthright expression by O'Donnell that he desired to obtain more information about Kinzua *before* making up his mind and *before* committing himself to anyone about anything.

Aside from the foregoing, the provisions of counsel's so-called "specific" and "affirmative" agreement are not even clear. They claim the "agreement" was "that Joseph and O'Donnell, *for themselves and groups headed by each,*" would negotiate for and consummate the purchase of Kinzua. We are unable to determine from counsel's statement whether the claimed "agreement" is between Joseph and O'Donnell themselves or between

Joseph and an unidentified group, on the one hand, and O'Donnell and an unidentified group on the other.

Either construction, however, *assumes* the existence of two groups to "consummate the purchase." But Joseph's own version of the record fails to reveal that such "groups" were in existence on November 18 and 19, 1952, or even that "groups" were discussed at the Portland meetings. There is not one scintilla of evidence in the record that O'Donnell had discussed Kinzua's purchase with any associates before he arrived in Portland on Nov. 18, 1952, and, of course, he had not. And Joseph himself testified that he did not discuss "groups" with O'Donnell. He testified (Joseph, R. 408):

> "Q. Now, had you at any time up to this period, do you recall mentioned in any of your conversations with O'Donnell whether or not you were going to have associates with you?
>
> "A. No, I don't think I did. All I said to him the evening we had dinner together on November 18 that we would take half the deal, *and what I had in mind* was myself and associates taking half the deal. We back in Chicago would take half the deal." (Emphasis supplied.)

It is too obvious to require comment that Joseph's testimony of what he "had in mind" is at best his own self-serving description of his state of mind, wholly unimportant, under ordinary principles of contract law, because, as he said, he had not "mentioned" it to O'Donnell.

Thus "groups" were discussed not at all during such conversations as Joseph and O'Donnell had in Port-

land, either on November 18 or 19, or later. The existence of "groups" headed by Joseph and O'Donnell exists solely as the brain child of counsel, conceived, obviously, of necessity. For the record is clear that Joseph could not and O'Donnell would not invest sums sufficient to acquire Kinzua by themselves. Joseph himself testified that he "had in mind" investing $250,000 for himself and an equal amount for the Joseph Lumber Company, which he controlled[47] (Joseph, R. 483, 676). This obviously would be wholly insufficient to purchase one-half of the "vast timber empire" ultimately sold for 12 million dollars. Without, then, the imaginary birth of unknown, undefined and non-existent groups to give it vitality, the claimed relationship between Joseph and O'Donnell as equal joint adventurers would have died even before it was conceived.

We do not belabor the point further although we think we could do so *ad infinitum*. Counsel's statement, appearing on page 12 of their brief, that:

> "They agreed specifically and affirmatively that Joseph and O'Donnell, for themselves *and groups* headed by each of them in Chicago and Seattle, respectively, should, as equal joint venturers negotiate for and consummate the purchase of Kinzua *on whatever suitable purchase basis could be arranged.*" (Emphasis supplied.)

is not fact. It exists only in counsel's enchanted world created by their own wishful thinking.

---

[47] The record shows Joseph was without means to provide even this amount. See Finding of Fact XII, Appendix II, pp. 47-8.

B. The Claimed Promises, If Made, Are Illusory and Are Too Vague, Indefinite and Uncertain with Respect to Essential Terms to Create a Contract Under Oregon Law

The non-existence of the contract counsel claims was created on November 18, 1952, need not be disproved by inference alone. It is disproved *directly* by Joseph's own testimony. Joseph himself testified (Joseph, R. 373-4).

> ". . . O'Donnell said to me, he said, 'Joseph, what do you have in mind on this deal?' 'Well,' I said, 'O'Donnell, Raleigh told me all about you, and he has implicit confidence in you, and he is associated with you, and I understand you have been very successful as an operator, and I am looking for someone that we can get into this thing that can handle this thing out here for me. I am not a sawmill operator, and *if the deal looks all right to you and looks all right to ourselves, we will take a 50 per cent interest, and you fellows take 50 per cent interest,'* and he said, 'That is all right with me.' " (Emphasis supplied.)

In Joseph's own words, then, neither he nor O'Donnell "agreed specifically and affirmatively" that they for themselves and nonexistent groups headed by them would "negotiate for and consummate the purchase of Kinzua *on whatever suitable purchase price could be arranged"* (Appellant's Opening Brief, p. 12). Contrariwise, if the words testified to by Joseph can be construed as a promise at all, either by him or by him and a so-called "group" he "headed," they are a promise that "we will take a 50 per cent interest" *only "if* the deal . . . looks all right to ourselves." No basis is out-

lined, however, upon which the "deal" might look "all right to ourselves." Since Joseph was totally unfamiliar with timber and sawmill operations and of Kinzua's holdings and of the price and other terms and conditions of its sale, it is safe to infer that he was in no position to define the conditions upon which "the deal" might look "all right to ourselves." In any event, he made no effort to do so.

But Joseph was not even sure of the words which he claims bound himself and O'Donnell "for themselves and groups headed by each of them . . . as equal joint venturers [to] negotiate for and consummate the purchase of" a $12,000,000 property (*Id.*). At the time of his deposition, Joseph, himself, did not testify that O'Donnell even agreed to the so-called "specific" and "affirmative" agreement by saying, "That is all right with me"; and when this was called to his attention upon cross-examination, he could not *remember* when he *first remembered* that O'Donnell had so stated. He testified (Joseph, R. 594-5):

> "Q. When did you remember that Mr. O'Donnell, according to your testimony, agreed to this?
>
> A. At the evening we were having a drink.
>
> Q. When did you for the first time remember about his agreeing to this?
>
> A. *I don't remember when I remembered it.*" (Emphasis supplied)

Nor could Joseph remember whether the claimed obligation was "we will *take a 50 per cent interest*" or whether it was "we will *raise half the money.*" At the time of taking his deposition he stated the obligation was "we'll *raise half the money*" (Joseph Dep., R.

~~31 The Argus Press for Briefs 2521 8-1 LN & 83166~~
2311). When this was called to his attention on cross-examination, he said that he did not remember whether he said *"raise"* or *"take"* (Joseph, R. 594-596). He testified he may have said either (Joseph, R. 594, 596), but he *thought* he would have said "take" (Joseph, R. 594).

Finally, Joseph did not know whether the claimed obligation to "raise half the money" or "take a 50 per cent interest" was conditioned upon whether the deal looks all right "to *ourselves*" or "to *me.*" At the time of taking the deposition Joseph used the words "to *me*" (Joseph Dep., R. 2311), whereas at the time of trial he used the words "to *ourselves*" (Joseph, R. 373-4).

Thus, in three attempts to define the agreement which Joseph's counsel claim binds "Joseph and O'Donnell, for themselves and groups headed by each of them . . . as equal joint venturers [to] negotiate for and consummate the purchase of" a $12,000,000 property (Appellant's Opening Brief, p. 12), Joseph himself was unable to state which one of four different versions was the actual agreement:

1. If the deal looks all right to *ourselves,* we will *take a 50 per cent interest;*
2. If the deal looks all right to *me,* we will *take a 50 per cent interest;*
3. *If the deal looks all right to ourselves,* we will *raise half* the money; or
4. If the deal looks all right to *me,* we will *raise half the money.*

Despite his uncertainty concerning the terms of the

alleged agreement, Joseph *was certain* he had *not* explained who "ourselves" and "we" were. As we have heretofore pointed out, he did not even tell O'Donnell that he expected to have associates with him in the deal (Joseph, R. 555-6). He further testified, albeit reluctantly, that at no time, either on November 18 or at any later time, did he give O'Donnell the names of any persons he believed might invest in Kinzua, nor did he indicate the amounts any of them might invest (Joseph, R. 555-6).

In summary, under the "agreement" appellant's counsel claim existed, it is impossible to determine *what* was promised; but if the so-called promises could be made certain, it is impossible to determine *who* was to be bound thereby, *i.e.,* whether Joseph and O'Donnell alone or Joseph and others and O'Donnell and others. If the latter be the case, the so-called agreement was entirely silent as to *who* those others might be. Thus there is complete uncertainty as to *what* was promised and as to *who* was obligated thereby.

The only thing certain about the so-called "specific" and "affirmative" agreement which counsel claims existed was that no one promised anything. For on Joseph's side of the so-called "bargain," the obligation, *regardless* of *what* it was and *who* was bound thereby, became effective *only if* the deal looked all right "to me," *i.e.,* Joseph, *or,* "to ourselves," *i.e.,* Joseph and others unnamed and unascertainable; and on O'Donnell's side of the so-called "bargain" the obligation became effective only if "the deal looked all right" to "you fellows," *i.e.,* O'Donnell and others unnamed and

unascertainable. Thus, the determination of whether the so-called promises, *whatever* they were, were ever to become effective upon anyone, rests exclusively in the untrammelled subjective determination of promisors unknown and unascertainable. Such "promises" are not promises at all.

In the Restatement of Contracts, Section 2, Comment (b), p. 4, it is said:

> "An apparent promise which according to its terms makes performance optional with the promisor whatever may happen . . . is in fact no promise . . . "

Cf. 1 Williston on Contracts, Third Ed., Section 1A, p. 5.

In light of the foregoing, the "agreement" which counsel claims exists is obviously not a *contract* of joint venture. That "agreement" purports to be one having for its sole consideration the mutual promises of the parties. In such a situation, unless the promises are binding on each of the parties, the alleged agreement lacks consideration and is therefore not a binding contract. In Sec. 79 at p. 88 of the Restatement of Contracts, it is stated:

> "A promise or apparent promise which reserves by its terms to the promisor the privilege of alternative courses of conduct is insufficient consideration if any of these courses of conduct would be insufficient consideration if it alone were bargained for."

In this case, both Joseph and his undefined group ("ourselves") reserved the absolute right not to participate in Kinzua's purchase, unless in their uncon-

trolled and untrammelled discretion, the "deal" looked "all right" to them. Even if a 50 per cent participation were offered them they were free to participate or not as they themselves saw fit. Thus they promised nothing. Nor did O'Donnell. *Cf., Lawrence Block Co. v. Paulson,* C.A., Calif. 1954, 123 Cal. App.2d 300, 266 P.2d 856.

But here there are other complications. Not only is the "agreement" vague, uncertain and illusory in the sense that the performance of the so-called "promises," *whatever* they are, are left to the untrammelled discretion of the promissors, *whoever* they are, but the persons ("ourselves" and "you fellows") who are to determine, even subjectively, whether the deal "looks all right" are unknown and unascertainable. Such an "agreement" obviously is not a binding enforceable contract. This is illustrated by the California case of *Toms v. Hellman,* 1931, 115 Cal. App. 74, 1 P.2d 31. There the court held that a contract looking to a corporate reorganization, some features of which were subject to the approval of a bondholders' committee not yet selected, was void for vagueness and indefiniteness. The court said at p. 35:

> "The tentative nature of the offer is also shown by the provision for the approval of the committee to the form of the indentures. This uncertainty as to form also occurs in the provision for a release schedule of lands 'which may be adjusted by a majority of the Bondholders Reorganization Committee' and in another provision that 'the committee may enter into an arrangement with the company to exclude such amounts' from sales 'as are necessary in their opinion for sales commission,

> etc.,' *because the number and method of selection of the members of the committee was undetermined.*" (Emphasis supplied.)

A promise may be illusory for the further reason that it is too uncertain for possible enforcement. Thus, Professor Corbin says, 1 Corbin, Contracts, Sec. 95, pp. 289, 290:

> "A promise that is too uncertain for possible enforcement is an illusory promise; but to determine whether or not it is an 'illusion' one must consider the degree and effect of its uncertainty and indefiniteness.
>
> "Vagueness and indefiniteness of language may be such as to indicate clearly that the parties do not themselves understand that they are contracting. In such cases they are merely engaged in the inoperative process of preliminary negotiating."

This, we think, is the case here. The fact that Joseph was unable to tell which one of four versions of an "agreement" was created in Portland, could be explained, of course, by his duplicity, but it could also be explained upon the ground that during their Portland meetings, Joseph and O'Donnell did not intend to make reciprocal promises amounting to a contract. Thus in *Reed v. Montgomery,* 1947, 180 Or. 196, 175 P. 2d 986, the Oregon Supreme Court said at p. 993:

> "We believe that the contradictory testimony which Plue gave concerning his part in financing the venture was not due to a lack of probity on his part, but to the fact that the respondent and he had not discussed the subject of financing sufficiently to afford either of them a clear conception of what was to be done. Discussions, no matter how ade-

quate, do not necessarily produce contractual relationships, but normally no contractual relationship is brought about as the result of discussion unless it is carried on to such an extent that the minds of the parties meet upon all of the essential terms of the proposed venture."

It is obvious in this case that Joseph's and O'Donnell's discussions had not been carried on to the point that their minds had met upon the essential terms of a venture having for its object the acquisition of a multi-million dollar property. For the purchase of Kinzua obviously required the raising of large sums of money, the extention of large credits, the drafting of large security devices, corporate dissolutions and an analysis and solution of many complicated operating, tax and legal problems before its property could be acquired and operated. These problems were discussed not at all in Portland, and only a few of them, if any at all, were discussed even slightly thereafter. Certainly no agreement even in *general* terms was entered into between Joseph and O'Donnell with respect to any of them.

In this case, before the so-called "agreement" which counsel claims existed could become a binding contract, the court would be required, not only to fill in the foregoing gaps in the "agreement" itself, but to supply additional unnamed and unascertainable co-adventurers to participate in Kinzua's acquisition and to define their fiduciary obligations to each other. This, of course, is a judicial impossibility. *For we know of no provision of law which will supply additional but unnamed co-partners or co-adventurers able to provide equity capital and define their rights and obligations to each other.*

In view of the fiduciary relationship which co-adventurers occupy toward each other it is obvious that the law will not foist such additional co-partners or co-adventurers upon another without his actual consent. *Cooper v. Kensil,* N.J. 1954, 106 Atl.2d 27, 31. In that case the plaintiffs claimed a contract right to participate in a project in which one of their associates was a joint adventurer with others. In holding that the alleged contractual provision was void for vagueness and uncertainty, the Court said at p. 31:

> "It is conceivable that an interest in a project originated and promoted by strangers could be offered to one of the four stockholders of Maple Shade—that the originator of such a project might want one or less than all of those interested in Maple Shade as associates and not want the balance of such stockholders. Was it the intent of this agreement *to foist* such undesirables upon the new syndicate or prevent the *persona grata* from entering into such a new contract? *The former it could not do* and the latter was not the clear intent of the parties." (Emphasis supplied.)

If it were possible to foist additional co-partners and co-adventurers upon another without his agreement and consent, the relationship of the parties would cease to be voluntary and hence not a partnership or joint adventure; for by definition that relationship can exist only by the *voluntary* action of the parties themselves. *Cf., Preston v. State Accident Commission,* 1944, 174 Or. 553, 149 P.2d 957.

No binding contract of joint venture to acquire Kinzua could arise until the co-adventurers had been selected, and each of them had agreed upon all the essen-

tial terms of the venture; for these are matters which the Oregon courts will not supply for the parties if they have not done so themselves.

Thus in *Reed v. Montgomery,* 1947, 180 Or. 196, 175 P.2d 986, the Oregon Supreme Court said at p. 993:

> "We think it is evident that many important phases of the contemplated relationship were left unmentioned in the discussion and in the writing. The alleged partnership proposed to engage in extensive operations involving the expenditures of large sums for payrolls, equipment and timber purchases. Moreover, the methods of operation, according to Plue's version of them, would be complex. For instance, the paper he depends upon seeks to create a partnership between the respondent as 'first party' and another unit consisting of himself and Reed as 'second party.' If the appellants are not a partnership or a joint enterprise, we are at a loss to know the nature of their association. To this complex structure it was proposed to add, according to the appellants, a co-operative association to be owned, somehow, by fifty or so woodworkers who would contribute $1,000 each. The mill which it was proposed to use was owned, not by the alleged partnership or co-operative, but by the respondent and an associate of his. We think that even the most versatile of lawyers would have to consume many hours with his clients and submit for their consideration many drafts of agreements in efforts to write a workable agreement between these several groups of conflicting interests. The groups themselves, in all likelihood, would have to make many revisions in their plans before the attorney could succeed in bringing them to agreement."

and further at p. 996:

> "We can not fill out the agreement for the parties, and yet unless there is inserted in it a covenant favorable to the appellants concerning the timber, they are entitled to no relief. It necessarily follows that the agreement is incomplete, and, therefore, unenforceable."

Cf., Mason v. Rose, 2 Cir. 1949, 176 F.2d 486; *Brown v. Bivings,* 1954, Okla., 277 P.2d 671; *Sticelber v. Iglehart,* 1934, 169 Okla. 453, 37 P.2d 638; *Greenbaum v. Kirkpatrick,* W.D. Okla. 1955, 129 F.Supp. 648.

C. The Words Which Counsel Claims Were Uttered on November 18, 1952 Were at Most Words of Prophecy

It is abundantly clear from the foregoing that counsel's so-called "agreement" is entirely too indefinite and vague to constitute an enforceable contract of joint venture. That vagueness and uncertainty extends (1) to *what* was promised, (2) to *who* was to determine *if* and *when* the promises were to become effective, (3) to *how* the determination was to be made, and (4) to *who,* in any event, were to be bound thereby. The indefiniteness and vagueness of the contract leads to but one conclusion. If the words which Joseph testified he and O'Donnell expressed to each other on November 18 and 19, were actually uttered by them at all, they amounted to no more than words of future prophecy. They could not be more; for too many essential matters remained to be worked out between them. *Cf., Dimitri Electric Company v. Paget,* 1944, 175 Or. 72, 151 P.2d 630. In this case the Supreme Court of Oregon held that the words, "If you can keep your price within twenty to twenty-five dollars, I will give you an order for the

whole business," even though accepted, did not constitute a contract. In so holding, the Oregon Supreme Court said (151 P.2d 634, 635):

> "We are convinced that the conversations which occurred in May of 1941, or thereabouts, were not deemed by Curry and Cosgrove at that time as forming a contract. We believe that the evidence merely shows that Cosgrove, before starting construction of the twenty houses, and before arranging for his mortgage loans, was anxious to know whether electrical fixtures were available at a price of twenty to twenty-five dollars for a house. If the plaintiff could sell at that price, Cosgrove intended to buy from them when the time arrived for making selections. Cosgrove's words 'If you can keep your price within twenty to twenty-five dollars, I will give you the order for the whole business,' in our opinion, did not mean that right then and there he contracted to buy twenty sets of fixtures. When those words were spoken, the excavation work had not yet begun. Similar words—equally promissory in character—are frequently employed by people while negotiating a future contractual relationship. In such instances, *if the parties contemplate further negotiations for the settling of undetermined terms, the words are deemed mere expressions of intention or of prophecy. In the present instance, the fact that the determination of kind, price and number of fixtures would have to wait until purchasers for the houses had been found and their whims had been gratified, is a clear indication that Cosgrove's words, 'I will give you the order for the whole business,' were a mere expression of intention.*" (Emphasis supplied.)

Further argument, we think, is unnecessary. Appel-

lant's counsel in this case face the same insurmountable difficulties that faced the plaintiff in *Reed v. Montgomery,* 1947, 180 Or. 196, 175 P.2d 986, 996. In that case the Oregon Supreme Court said:

> "Two insurmountable difficulties, therefore, confront the appellants: (1) The parties, as the circuit court's findings point out, did not intend in any of their other discussions to effect a contractual relationship, although Plue and the respondent looked forward to entering into some sort of agreement in the event that Plue could procure the needed sums of money; and (2) if the writing upon which this suit is predicated could be deemed a contract, it is incomplete. We do not hold that it is essential to the consummation of a contract that the parties intend to contract, but deem the expression of an assent as indispensable to the formation of an agreement. None of the parties, in our opinion, assented to the consummation of a contractual relationship."

But here counsel face *another* insurmountable difficulty as well. The promises of the parties are illusory. The parties promised nothing. Hence, their so-called "agreement" lacks consideration necessary to create a binding contract of joint venture.

There is nothing in Joseph's testimony regarding events occurring subsequent to November 19, 1952 which would be sufficient, standing alone, to constitute a contract of joint venture between Joseph and O'Donnell, either expressly or by implication. Joseph's case necessarily depends upon establishing a contract of joint venture between Joseph and O'Donnell during their Portland visits on November 18 and 19.

In this section of our brief, we have assumed, arguendo, the truth of Joseph's version of the facts. We have demonstrated that even his version negates the existence of a contract of joint venture between him and O'Donnell.

The trial court, however, did not accept Joseph's version of the facts. It found O'Donnell to be an entirely trustworthy witness; and where O'Donnell's testimony contradicted that of Joseph, the trial court found in accordance with O'Donnell's testimony. The trial court's findings of course are presumed to be correct. But under any view of the record, the conclusion is necessarily compelled that Joseph and O'Donnell never became joint adventurers.

CONCLUSION

This appeal is concerned with fact issues. Appellant raises no point of law that has an existence independent of them. Those issues do not arise from the trial court's disregard or misunderstanding of any definite and well-established fact. Appellant's complaint is nothing more nor less than that the trial court, in weighing the evidence and judging of the credibility of the witnesses, evaluated and interpreted the evidence differently than appellant desired.

The resolution of the fact issues involved in this case necessarily required a determination of designs, motives and intentions of appellant and O'Donnell with respect to acts that occurred long before the trial in the court below. Their resolution depended peculiarly upon the evaluation and interpretation of conflicting oral

testimony of witnesses having a direct interest in the outcome of the case.

Evaluating the lengthy and complex record and judging of the credibility of the witnesses, the trial court found the facts adversely to appellant's position and in favor of appellees'. Those findings are not clearly erroneous. On the contrary they are supported by substantial, credible and competent evidence. They are entirely reasonable. They are in fact the only rational findings an objective trier of the fact could make on the record. Hence, there is no factual or legal basis for this court to retry the case *de novo*.

No rule of law was violated. The trial court's findings are clearly correct; they should not be disturbed.

The lower court's judgment of dismissal with prejudice should be affirmed.

Respectfully submitted,

RYAN, ASKREN, MATHEWSON, CARLSON & KING
JOHN E. RYAN, JR.
RICHARD K. BUSH
Attorneys for Appellees Capital Timber Products Co., and Mark F. Mathewson and Richard K. Bush, Trustees in Dissolution.

GRAHAM, GREEN & DUNN
THOMAS M. GREEN, JR.
BRYANT R. DUNN
FRANK T. ROSENQUIST
and
WILBUR J. LAWRENCE
Attorneys for Appellees Donover Company,

, Kin-
E. W.
n and

OSSCUP, AMBLER, STEPHEN & MILLER
HN AMBLER
NDELTON MILLER
11 Central Building, Seattle, Washington,
Attorneys for Appellee, Harry J. O'Donnell.